150 U.S. 512

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 921.

MRS. MARTHA INSLEY ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 21, 1893.

(15,298.)

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INDEX.

	Original.	Print.
Caption to transcript	*a*	1
Transcript from the circuit court of the United States for the district of Kansas	1	1
Amended bill of complaint	1	1
Answer	6	6
Agreed statement of facts	8	7
Abstract of title to lots 1 and 3, block 104, Fort Scott, Kansas	11	10
Record in case United States *vs.* J. H. Roe *et al*	15	13
Recognizance of defendants	15	14
Order: Default and forfeiture of bail bond	16	15
Writ of *scire facias* and return of service	17	15
Motion to quash writ of *scire facias*	18	16
Motion for judgment on forfeiture	19	17
Judgment	19	17
Praecipe for transcript of record	20	18
Order of United States circuit court dismissing writ of error	21	18
Certificate clerk United States circuit court to copy order	21	19
Rule 2, United States district court, as to practice	21	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1893.

	Original.	Print.
Opinion	22	20
Final decree	26	23
Assignment of errors	28	25
Petition for allowance of appeal	28	25
Waiver of citation by defendants	28	26
Order allowing appeal	29	26
Certificate of clerk to transcript	29	26
Appearance of counsel for appellant	30	27
Appearance of counsel for appellees	30	27
Entry of submission on motion to dismiss	31	28
Order of dismissal	31	28
Notice of motion to reinstate	32	29
Motion and affidavits to reinstate case	33	30
Order reinstating case	38	33
Cause argued and submitted	39	34
Opinion	40	34
Decree	44	38
Petition for appeal	45	39
Assignment of errors	46	39
Order allowing appeal	47	40
Supersedeas bond	48	41
Citation and admission of service	50	42
Clerk's certificate to transcript	51	43

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, of the December term, 1892, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fifth day of December, A. D. 1892, before the Honorable Henry C. Caldwell and Honorable Walter H. Sanborn, circuit judges, and Honorable Amos M. Thayer, district judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the second day of May, A. D. 1892, a transcript of record in pursuance to an appeal allowed by the circuit court of the United States for the district of Kansas was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript is in the words and figures following, to wit:

1 Be it remembered that heretofore, to wit: on Nov. 28, 1884, the complainant, by its solicitor, filed in the clerk's office of the circuit court of the U. S. district of Kansas its bill, which bill as afterwards amended and filed in said court was as follows:

"In the Circuit Court of the United States for the District of Kansas.

THE UNITED STATES, Plaintiff,
vs.
Mrs. MARTHA INSLEY, Formerly MARTHA PALMER; Mrs. LAURA Guelick, Formerly Laura Palmer; Mrs. Barbury R. Insley, Formerly Barbury R. Palmer, and James M. Palmer, Heirs-at-law of Polly Palmer, Deceased; Mrs. Elizabeth McElroy, Wife and Heir-at-law of M. McElroy, Deceased, and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, Heirs-at-law of M. McElroy, Deceased, and Mrs. Elizabeth McElroy, as Administratrix of the Estate of M. McElroy, Deceased, and E. Nold, Defendants.

Amended Complaint.

To the judges of the circuit court of the United States for the district of Kansas:

Leave first had and obtained, the United States brings this its bill against the defendants, and thereupon gives information and says:

That on or about the 16 day of October, 1869, it recovered a judgment at law in the United States district court for the district of Kansas in a suit then pending wherein complainant was plain-

tiff and one Moses McElroy and Charles Bull were defendants. In said case judgment was rendered in favor of complainant and against both of said defendants for the sum of $2,000.00. That on or about the sixth day of November, 1869, execution issued on said judgment, a levy made upon the property of the defendant M. McElroy, which execution was afterwards returned unsatisfied for want of bidders at said sale. That soon thereafter, to wit, on or about June 9, 1870, a second execution issued thereon and property belonging to defendant M. McElroy was levied on, but said property was unsold and said execution returned unsatisfied, and said judgment still remained unsatisfied and unpaid.

Complainant further says: On or about the 7th day of August, 1869, said McElroy, defendant, and his wife Elizabeth
2 McElroy, defendant herein, made, executed and delivered to one Polly Palmer their certain note and mortgage on lots one and three in block No. one hundred and four, in the city of Fort Scott, Bourbon county, Kansas, to secure the sum of $3,500.00, theretofore advanced by said Polly Palmer to the said M. McElroy as a security therefor. Said note being unpaid, the said Polly Palmer, mortgagee, did, on the 30th day of May, 1871, institute a suit in the district court of Bourbon county, Kansas, wherein Polly Palmer, mortgagee, was plaintiff, and said M. McElroy and his wife, Elizabeth McElroy, defendant herein, were parties defendants. Said suit was brought to foreclose the above-mentioned mortgage, and on or about Oct. 4, 1871, judgment was rendered in said suits in favor of Polly Palmer and against said McElroy and his wife, Elizabeth McElroy, for the sum of $3,764.16, and for a foreclosure of the mortgage; and said sum was declared to be the first and best lien upon the above-described property, and said property was ordered to be sold to satisfy the same.

Soon thereafter special execution issued on said Palmer judgment and levy was made upon above-described property, which was afterwards sold by the sheriff of Bourbon county, Kansas, and bought in by Polly Palmer, the judgment creditor, which sale was by the court confirmed, and on Jan'y 4, 1872, a sheriff's deed was executed and delivered to said Polly Palmer and duly filed for record in the office of the register of deeds of Bourbon county, Kansas. At the date of the institution of the foreclosure proceedings above mentioned, instituted by the said Polly Palmer, and against the said M. McElroy and wife, the complainant's judgment heretofore mentioned, was a good and valid judgment in favor of complainant, and against the said M. McElroy, defendant in the said Polly Palmer suit, and was duly entered of record in the clerk's office in the United States district court of the State of Kansas; that execution had theretofore been issued, and the United States marshal had made a levy, and at the time above mentioned, to wit, May 30, 1871, lots 1 and 3, in block 104, city of Fort Scott, Kansas, was being advertised for sale, and was to have been sold on June 6, 1871, at the front door of the court-house, in the city of Fort Scott; that on said June 6, 1871, lot 1, block 104, was sold. The complainant became the purchaser thereof, there being no other bidders at said sale. Said sale was

afterwards, to wit, on October 16, 1871, confirmed in the U. S. district court for the district, and a deed ordered to be made to the United States, the purchaser thereof.

3 Complainant further says in the above-mentioned suit brought by the said Polly Palmer in the district court of Bourbon county, Kansas, this complainant was not made a party defendant and in no way appeared in said suit; that on said May 30, 1871, complainant was a judgment creditor of said M. McElroy, and said judgment was a lien on all the above-described real estate, the property of the said M. McElroy; that as such judgment creditor it brings this action for the purpose of redeeming said land from said Polly Palmer, mortgagee and purchaser as above.

Complainant further says that on or about the 13th of November, 1872, the said Polly Palmer died intestate, leaving as her sole surviving heirs-at-law the following-named children, to wit:

Mrs. Martha Insley, Mrs. Laura Guelick, Mrs. Barbury R. Insley, and James M. Palmer, all over the age of 21 years.

That soon thereafter James M. Palmer was appointed administrator of her estate, qualified, gave bond and entered upon the discharge of his duties as such administrator; that as such administrator he administered upon the estate of Polly Palmer, deceased, up until the year 1878, at which time he made final report to the probate court of his acts and doings as such administrator and asked to be discharged, which was accordingly granted, and he was released as such administrator, and there is now no administrator of the estate of Polly Palmer, deceased.

In the year 1881, the said M. McElroy departed this life intestate, leaving as his sole surviving heirs-at-law his widow, Elizabeth McElroy, defendant herein, and the following-named children, to wit:

Eliza J. McElroy,	aged	20	years.
Emma G. McElroy,	"	18	"
Mary A. McElroy,	"	17	"
Henry McElroy,	"	15	"
Hilda McElroy,	"	12	"
Moses McElroy,	"	10	"
William McElroy,	"	6	"
Ethel McElroy,	"	3	"

That soon thereafter, to wit, on or about Sept. 1, 1881, the said Elizabeth McElroy was appointed, qualified, gave bond and entered upon the discharge of her duties as such administratrix of the estate of M. McElroy, deceased, and is now the administratrix of the estate of said M. McElroy, deceased.

Complainant says it has made due and proper demand upon defendants that they disclose the amount still due and unpaid, if any,

4 on said Polly Palmer mortgage of date Aug. 7, 1869, and on the judgment of foreclosure thereof, in order that complainant could pay the same to the party entitled thereto, and defendants failed and refused to give the same, and claimed that complainant had no right or interest in and to said lot 1, block 104, and had no right to redeem the same.

Complainant further says that it is now and ever has been ready

and willing at all times to pay the amount necessary to redeem said lot 1, block 104, from said mortgage, and now here comes into court and is ready and willing, and offers what, if anything, shall appear to remain due in respect to the principal and interest on said mortgage in order to redeem said property therefrom and from the judgment of foreclosure rendered thereon.

Complainant further says that on or about the 30th day of October, 1883, it received a deed for lot 1, block 104, from Hon. B. F. Simpson, U. S. marshal for the district of Kansas, based on the sale of June 6, 1871, in accordance with the order of court, dated October 16, 1871, and is now and has been ever since said June 6, 1871, the owner of said above-described land, with full right of possession thereof, subject only to the right of the estate and heirs-at-law of Polly Palmer, deceased.

The defendants, and each of them, claim to have some right, interest or equity in and to said land adverse to complainant, but complainant says that whatever right, title, claim, interest or equity the defendants, or any of them, may have or claim to have in and to said land, is junior, inferior and subordinate to that of complainant.

Complainant further says the amount due to the estate of Polly Palmer, deceased, on said mortgage of date Aug. 7, 1869, and on said judgment of foreclosure thereof has long since been paid, and complainant asks that defendants be required to show what payments have been made thereon, and when such payments were made.

Complainant further says there was a large brick store building on said lot 1, block 104, at the time it was levied on and sold to the United States, and said lot 1 is now of the value of $8,000.00, and it was on said lot at the time suit was brought by Polly Palmer to foreclose her said mortgage, and that said M. McElroy was at the time in the possession thereof, and carried on business therein for a number of years, and remained and continued in possession thereof during all of said time and up to the time of his death, in and about the management of said business, and paid taxes thereon all of said years, and that no possession of said premises was taken by Polly Palmer when said sheriff's deed was given to her, and that the annual rental value of said lot 1, block 104, was and ever since has been $500.00 per year, and the rental value of lot 3, block 104, was and ever since has been $300.00 per year, and the annual rental value of said property has been $800.00 per year, and that said sum of $800.00 annually should be applied by defendant in satisfaction of the amount due, if anything be due, to the estate of Polly Palmer, deceased, from said M. McElroy, deceased.

By the strict rules of common law complainant has no adequate and sufficient remedy whereby complete and perfect justice can be done, and brings this action for an accounting between the parties hereto, and to redeem said land from said mortgage and the judgment of foreclosure thereunder and for possession thereof.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises, in this honorable court, where matters of this nature are properly cognizable and relievable, your

orator solicits the aid of this court to compel said defendants a full, true and perfect answer make to all and singular the statements and charges above set forth, answers under oath, however, being hereby expressly waived by said complainant as to each of said defendants, and that an account may be taken of what, if anything, is due to the said Martha Insley, Laura Guelick, Barbury R. Insley and James M. Palmer, defendants and heirs-at-law of Polly Palmer, deceased, for principal and interest on said mortgage debt, and that said defendants, heirs-at-law of Polly Palmer, deceased, be required and directed to marshall their securities, and first subject to the payment of the amount due on the Polly Palmer mortgage and judgment above set out, if any be due, the said lot 3, block 104, it being a part of the property included in their said mortgage and judgment and sheriff's deed, and on which said lot 3, block 104, the complainant had a lien, and asks that an accounting may also be taken of the rents and profits of said above-described premises, to wit, lot 1, block 104, the property of complainant, which have been possessed or received by said defendants, heirs of Polly Palmer, deceased, or by their order, or for their use, or which without their wilful fault or neglect may have been received, and that if it shall appear that said rent and profits have been more than sufficient to satisfy the principal and interest of said mortgage debt, that then said defendants be decreed to pay the excess to your orator, and that complainant be permitted to redeem said property, it being ready and willing to pay whatever, if anything, shall appear to remain due in respect to principal and interest on said mortgage debt, and that defendants may be adjudged to deliver up the possession of said lot 1, block 104, to complainants or to such persons as it shall
6 direct, free from all incumbrances made by defendants or any of them, and for such other further or different relief as the court shall in equity see proper to grant.

And may it please your honors to grant unto your orator a writ of subpœna issued under the seal of this court, directed to said Martha Insley (formerly Martha Palmer), Laura Guelick (formerly Laura Palmer), Barbury R. Insley (formerly Barbury R. Palmer), and James M. Palmer, heirs-at-law of Polly Palmer, deceased; Elizabeth McElroy, wife and heir-at-law of M. McElroy, deceased, and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy and Ethel McElroy, heirs-at-law of M. McElroy, deceased, and Mrs. Elizabeth McElroy, as administratrix of the estate of M. McElroy, deceased, and E. Nold, therein and thereby commanding them on a certain day, and under a certain penalty therein to be limited, personally to be and appear before your honors in this honorable court, and then and there full, true, direct and perfect answers make to all and singular the premises. And further to stand to, perform and abide such further order, direction and decree herein as to your honors shall seem meet; and your orator will ever pray."

W. C. PERRY,
U. S. Attorney for the District of Kansas.
C. L. WARE, *Of Counsel.*

Indorsed: I consent to filing, now, July 21, '85. J. D. McCleverty. Filed July 22, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

To which bill the following answer, by leave of court and consent of parties was filed in the United States circuit court for the district of Kansas:

Answer.

THE UNITED STATES, Complainant,
vs.
MARTHA INSLEY and ELIZABETH MCELROY *et al.*, Def's.

Now, come each and every of the said defendants and say: That they all, save and except the said Elizabeth McElroy, disclaim any and all right, title and interest in and to the property in dispute in this case.

The said Elizabeth McElroy for her answer herein says: That she admits that she is the owner of the said lot 1, block 104, in the city of Fort Scott, Bourbon county, State of Kansas, and became such owner by purchase thereof from one Polly Palmer,
7 and avers that at and before the time when the said complainant claims that its right and lien against said property accrued, this defendant purchased said property from the said Polly Palmer, who obtained title by virtue of a foreclosure of a mortgage upon said property for the sum of $3,500, dated August 7, 1869, with 12 per cent. interest from that date, which in due course of procedure was foreclosed in the district court of Bourbon county, State of Kansas, in an action brought by said Polly Palmer against the said Moses McElroy and Elizabeth McElroy, in which a decree of foreclosure in due form was rendered, and said property sold at sheriff's sale and purchased by the said Polly Palmer, who thereafter made a conveyance in due form to this defendant, Elizabeth McElroy.

Said defendant further says, that she denies that the said complainant has, or ever had any lien by way of judgment, levy of execution or otherwise upon said real estate or any part thereof. And denies that the said complainant has now, or ever had, any judgment against the said Moses McElroy, or any other person, who at any time ever owned said real estate.

Defendant further says, that the amount of redemption now due her as assignee and owner of the said mortgage of Polly Palmer, is the sum and amount of $12,000.00; that she has erected and expended in good faith, in the way of buildings and improvements on said real estate, the further sum of $8,000.00; that she has paid taxes and assessment charges against said real estate in the sum of $900.00, all of which, in any event, is a first and prior lien upon and against said real estate; that while she has received a small amount of rents, that she is now unable to state the exact amount thereof, but that it does not exceed the sum and amount of $3,500.00. Except as herein specifically admitted, and without ad-

mitting any right or claim in the said complainant, this defendant denies each and every allegation in complainant's bill contained.

She further avers that she now is and has been for a long time in the sole and undisputed possession of said real estate; that she is the legal and equitable owner thereof, and entitled to have and to hold the same free and clear of any right, claim or lien made and asserted as being in or belonging to said complainant.

Wherefore, she prays that her title and possession of said real estate may be forever quieted as against the said complainant, and it forever enjoined from claiming or asserting any title, right or claim thereto, and for such other or further and different relief as may be proper in the premises, with costs.

J. D. McCLEVERTY,
Sol'r for Def'd'ts.

8 Thereupon on June 21, 1891, the following agreed statement of fact was filed:

Agreed Statement of Facts.

It is agreed by and between the parties hereto that the facts hereinafter stated, together with the records referred to, shall constitute all of the evidence in this case upon which the court shall determine the rights of the parties hereto, to wit:

The title to the property in dispute, being lot one (1), in block one hundred and four (104), in the city of Fort Scott, Kansas, is as shown by the abstract of title thereof, hereto attached, except as modified by the other facts herein stated.

The right and claim of the plaintiff, The United States, under which redemption from defendants is claimed in this suit, is based upon the record and proceedings in the case of The United States *vs.* Joseph H. Roe, C. A. Ruther, M. McElroy and Charles Bull, being case number three hundred and sixteen (316) in the district court of the United States for the district of Kansas, the files and record in which said case shall be introduced and read as a part of the evidence in this case upon the trial hereof.

The right of the defendants to said lot is based upon the title as shown by the said abstract above mentioned, and exhibits attached and referred to in said abstract, except as modified by the other facts herein stated.

The said M. McElroy, one of the defendants named in the said case number three hundred and sixteen (316), above mentioned, purchased the said lot one (1), in block one hundred and four (104), in the city of Fort Scott, Kansas, and also lot three (3) in said block, on the 5th day of August, 1869, for the sum of six thousand dollars ($6,000), the conveyance to him being delivered August 7th, 1869; and for the purpose of raising a portion of the said purchase-money, he, together with Elizabeth McElroy, his wife, on August 7th, 1869, mortgaged said lots one and three (1 and 3) to one Polly Palmer, for the sum of three thousand five hundred dollars ($3,500), which said mortgage was afterwards foreclosed, as shown

by Exhibit "A," attached to the said abstract of title, in the district court of Bourbon county, State of Kansas, in the action of Polly Palmer *vs.* M. McElroy and Elizabeth McElroy, and the sheriff's deed in the said foreclosure proceedings was executed and delivered to Polly Palmer on January 4th, 1872, conveying to the said Polly Palmer the said lots one and three (1 and 3), in block one hundred and four (104), in the city of Fort Scott, Kansas. The United States was not made a party to said foreclosure suit.

9 Thereafter the said M. McElroy, whose full name was Moses McElroy, continued in the possession of the said lots one and three (1 and 3), with the consent of the said Polly Palmer, until shortly before the death of the said Polly Palmer, when being advised that said Polly Palmer's title to said lots was perfect, the said defendant, Elizabeth McElroy, who was then the wife of said M. McElroy, purchased through the said M. McElroy, as agent, the said lots one and three (1 and 3) from the said Polly Palmer under an agreement in writing, which is now lost, which provided that upon payment by the said Elizabeth McElroy to the said Polly Palmer, her heirs or assigns, of the amount of said foreclosure, judgment and costs, with interest at the rate of ten per cent. (10 per ct.) per annum, the said Polly Palmer would convey to the said Elizabeth McElroy the said lots one and three (1 and 3), in block one hundred and four (104), in the city of Port Scott, Kansas by a good and sufficient deed of conveyance. Said agreement of purchase was never complied with by the said Elizabeth McElroy, and was declared forfeited; and afterwards, in July, 1878, a new and similar agreement of purchase, but at a lower rate of interest, was made by said Elizabeth McElroy with the heirs of Polly Palmer, which agreement is now also lost, and pursuant to said last agreement the heirs of the said Polly Palmer made the conveyances mentioned in the abstract, by virtue of which the entire title and ownership of said lots one and three (1 and 3), above mentioned, became and was vested in the said defendant Elizabeth McElroy, except as affected by the claim or interest of the complainant in this action, if it shall be determined any such claim or interest exists.

The payments to Polly Palmer and her estate of the purchase price were made by Moses McElroy from his own funds while living, and after his death the balance thereof also was paid from his estate, and from the same sources the taxes were paid until the bringing of this action.

After the said agreement of purchase had been made by the said Elizabeth McElroy, she improved the said lots by erecting certain buildings thereon at an expenditure of several thousand dollars, and has ever since paid all taxes and assessments levied upon said property, and has also collected the rents and enjoyed the use and benefit of said property, and the rents and profits so received and enjoyed by the said Elizabeth McElroy since her purchase of said lots, exceeds by a small amount the principal and interest that would now be due under the said mortgage of August 7th, 1869, by way of redemption, and also exceeds in addition thereto the total

amount expended by the said Elizabeth McElroy since her
10 said purchase, for improvements made and taxes paid upon said property, with interest to this date.

On the 13th of November, 1872, the same Polly Palmer departed this life intestate, leaving as her sole heirs-at-law the following children, to wit: Mrs. Martha Insley, Mrs. Laura Guelick, Mrs. B. R. Insley, and James M. Palmer, all of them being twenty-one (21) years of age, and before the commencement of this suit the estate of the said Polly Palmer had been fully settled up and the administrator thereof discharged.

On the 24th day of August, 1881, the said M. McElroy departed this life intestate, leaving as his sole heirs-at-law his widow, Elizabeth McElroy, and the several children named in the complainant's bill. On September 1st, 1881, the said Elizabeth McElroy was duly appointed and qualified as administratrix of the estate of the said M. McElroy, and since the commencement of this suit the estate of the said M. McElroy has been fully settled up and his administratrix discharged therefrom.

It is also agreed that if upon consideration of these facts the lien and claim of the complainant shall be sustained, the form of decree to be entered shall so provide, declaring the lien of the complainant and fixing the amount thereof, and providing that if within ninety (90) days after the date of such decree the said Elizabeth McElroy shall pay into this court for the use and benefit of the said complainant, the amount of such decree, together with six per cent. (6 per cent.) interest, to the date of such payment, and all costs in this action, then the title of the said Elizabeth McElroy to the said lots one and three (1 and 3) above mentioned, shall be quieted as against any and all claim of the said complainant; and that it shall thereupon convey to her all of the title and interest now claimed or belonging to the said complainant, and in default to so convey, that such decree shall operate as such, and also providing that the United States marshal for the said district of Kansas, upon application of said Elizabeth McElroy, shall execute and deliver to her a proper deed of conveyance, conveying to her all the title and interest of the said complainant in and to said property. Also providing if within said ninety (90) days the amount so found due, with interest and costs, be not paid, then process shall issue for the sale of said lot one (1), in block — (104), aforesaid; and when so sold shall be freed and cleared of and from any and all right, title, and interest of said defendants and each and every of them, in and to the same.

If, however, upon the facts above stated, the said court shall find
and adjudge in favor of said defendant, Elizabeth McElroy,
11 then the form of the decree shall be quieting her title as against any and all claim on the part of the complainant, and, adjudging that it shall pay all costs herein, and for a like conveyance to her as above set forth.

The abstract of title, forming part of the agreed statement of facts, is as follows:

Abstract of title
to
Lots 1 and 3, block 104, city of Fort Scott, Kansas.

It is conceded by all parties to the suit that the title and possession of the property in controversy was, upon April 20th, 1867, vested in John A. Bryant, who, for the purposes of this abstract, is taken and deemed to be the common source of title.

John A. Bryant and Nancy E. Bryant, his wife,
to
Moses McElroy.

Conveyance No. 1.—Warranty deed, dated August 5th, 1869. Filed August 7th, 1869, in Book K, page 70; consideration $6,000.00; for lots 1 and 3, block 104, city Fort Scott, Kansas.

Moses McElroy and Elizabeth McElroy, his wife,
to
Polly Palmer.

Conveyance No. 2.—Mortgage, dated August 7th, 1869. Filed August 9th, 1869, in Book A, page 220; consideration, $3,500.00; for lots 1 and 3, block 104, city Fort Scott, Kansas. Due 5 years; interest 12 per cent. per annum, payable quarterly.

NOTE.—For foreclosure proceedings see "Exhibit A," and for deed see transcript No. 4.

"EXHIBIT A."

The proceedings in the foreclosure suit in the district court of Bourbon county, State of Kansas, in the case of Polly Palmer, plaintiff, *vs.* M. McElroy and Elizabeth McElroy, defendants, show the following facts:

May 30th, 1871, the petition in said case was filed, which states in substance that on the 7th day of August, 1869, the said defendant, M. McElroy, executed and delivered to the said plaintiff, Polly Palmer, his promissory note for the sum of three thousand five hundred dollars ($3,500.00) payable five (5) years after date, with twelve per cent. (12 per ct.) interest, payable quarterly. Said note provided that the same should become due at any time after twelve (12) months on three (3) months' notice. That such notice had been given, whereby said note became due and payable.

12 Said petition also alleges that to secure the payment of said note and interest the said defendants, M. McElroy and Elizabeth McElroy, his wife, executed and delivered to the said Polly Palmer, along with said note and to secure the payment thereof, their deed of mortgage conveying lots one and three (1 and 3), in block one hundred and four (104), in the city of Fort Scott, Kansas.

Said petition prays judgment for the amount due on said note and for a foreclosure and sale of said real estate.

The proceedings, as shown by the journal of the court, set forth

at page three hundred and one (301), Journal "D," are that on October 4th, 1871, a judgment and decree of foreclosure was entered in said case for the sum of three thousand seven hundred and sixty-four dollars and sixteen cents ($3,764.16), costs of suit, and ordering a sale of said real estate. On October 25th, 1871, an order of sale was issued in said case, under which lot one (1), in block one hundred and four (104), above described, was appraised at the sum of three thousand one hundred dollars ($3,100.00), and said lot three (3), at one thousand one hundred dollars ($1,100.00), making a total of four thousand and two hundred dollars ($4,200.00).

That said property was duly advertised for sale and sold to the plaintiff on December 4th, 1871, for the sum of three thousand seven hundred and eighty-six dollars and six cents ($3,786.06). Which sale was afterwards, on December 26th, 1871, confirmed by the court and the sheriff ordered to execute and deliver to said purchaser a full and sufficient deed of conveyance for said premises.

Moses McElroy and Elizabeth McElroy, his wife,
to
E. R. Threlkeld, John L. West and Thomas West.

Conveyance No. 3.—Mortgage, dated January 20, 1871. Filed January 21st, 1871, in Book B, page 119; consideration $700.00; for lots 1 and 3, block 104, city Fort Scott, Kansas.

NOTE.—Satisfied Nov. 9th, 1874, on margin of record, viz: "Fort Scott, Nov. 9th, 1874. We hereby acknowledge full payment and satisfaction of this mortgage. (Signed), E. R. Threlkeld, John S. West, Thomas West, by C. O. French, their att'y. Attest, D. T. Hiatt, register."

13 Moses McElroy and Elizabeth McElroy, by C. S. Wheton, sheriff,
to
Polly Palmer.

Conveyance No. 4.—Sheriff's deed, dated January 4th, 1872. Filed January 9th, 1872, in Book P, page 424; consideration $3,764.16; for lots 1 and 3, block 104, city Fort Scott, Kansas. Deed recites:

"Judgment in district court of Bourborn county, Kansas, October 4th, 1871, wherein Polly Palmer, plaintiff, *vs.* Moses McElroy and Elizabeth, plaintiff, for $3,764.16 and costs, $86.00, in default of 10 days said real estate should be sold according to law by the sheriff of said county, and whereas the sheriff, by virtue of an order of sale duly issued October 25th, 1871, did, after having caused the same to be duly appraised and advertised, sell according to law, December 4th, 1871, the lands and tenements above described to Mrs. Polly Palmer for $3,786.06, being ⅔ of the appraised value thereof, and she being the highest and best bidder, which sale was at the December term, 1871, of said court, exam-

ined and confirmed, and said sheriff ordered to convey the s premises by a good and sufficient deed to Mrs. Polly Palmer, cording to law."

(For court proceedings see "Exhibit A.")

B. R. Insley and G. T. Insley, her husband,
to
Mary L. Palmer.

Conveyance No. 5.—Warranty deed, dated January 13th, 18 Filed January 30th, 1883, in Book 35, page 205; considerati $1,833.00; for undivided ½ lots one and 3; block 104, city Fo Scott, Kansas, and other real estate.

Moses McElroy, by United States marshal,
to
United States.

Conveyance No. 6.—Marshal's deed, dated October 30th, 188 Filed November 3d, 1883, in Book 36, page 632; considerati $2,467.00, and recites:

"On November 6th, 1869, of the district court of the Unite States for the district of Kansas, in an action then pending, i which The United States was plaintiff, and Joseph H. Roe, C. A Ruther, M. McElroy and Charles Bull were defendants, said plain tiff recovered a judgment *vs.* said M. McElroy and Charles Bull, o $2,000.00 and costs, $32.10, and it was ordered by said court that in default of payment the personal property and lands and tenements belonging to defendants should be sold by the United States marshal for the district of Kansas, and the proceeds of said sale applied to the satisfaction of said judgment and the United States marshal for the district of Kansas, by virtue of an order of sale issued by the clerk of the United States district court, bearing date of April 27th, 1871, did sell separately, on June 6th, 1871, the following-described property of defendant, M. McElroy: Lot 1, block 104, city Fort Scott, Kansas, to the United States for $2,192, and lot 11, block 120, in city Fort Scott, Kansas, to the United States for $275.00, it being the highest and best bidder for each of said pieces of property, and said sums being the highest and best prices bidden therefor, and said sums being more than ⅔ of the appraised value thereof, and there being no goods and chattels of the defendants, or either of them, whereon to levy, which sale was at the October term of said court, 1871, examined and confirmed, and United States marshal ordered to convey said premises by a good and sufficient deed to said purchaser."

M. A. E. Insley and W. A. Insley (unmarried),
to
J. M. Palmer.

Conveyance No. 7.—Warranty deed, dated March 3d, 1884. Filed March 7th, 1884, in Book 38, page 604; consideration $1,200.00;

undivided ¼ lots 1 and 3, block 104, city Fort Scott, Kansas, and other real estate, subject to a bond for a deed in favor of Moses McElroy.

Elizabeth McElroy, widow,
to
L. J. & J. H. Gulick.

Conveyance No. 8.—Agreement, dated March 30, 1886. Filed May 18th, 1886, in Book 45, page 303; consideration $1,000.00, as follows:

"I, Elizabeth McElroy, hereby bind myself in the sum of $1,000.00 to L. J. & J. H. Gulick for all damages that may accrue to them from giving me a warranty deed to lots 1, 3 and 4, block 104, in city Fort Scott, Kansas, and other real estate, and shall not claim any damages from any taxes, liens or judgments that be against said lot-, as I know full well the title thereto.

(Signed) ELIZABETH McELROY."

James M. Palmer and Mary L. Palmer, his wife, heirs-at-law of Polly Palmer, deceased,
to
Elizabeth McElroy.

Conveyance No. 9.—Quitclaim deed, dated September 10th, 1886. Filed September 23d, 1886, in Book 46, page 378; consideration $5,000.00; for undivided ¾ interest in and to lots 1 and 3, block 104, city Fort Scott, Kansas, and other real estate. Grantors state that the only heirs left by Polly Palmer are Martha Insley, Laura J. Gulick, Barbara R. Insley, daughters, and James M. Palmer, son.

Laura J. Gulick and J. H. Gulick, her husband,
to
Elizabeth McElroy.

Conveyance No. 10.—Warranty deed, dated April 26, 1886. Filed September 23d, 1886, in Book 46, page 379; consideration $1,500; for undivided ¼ interest in and to lots one and three, block 104, city Fort Scott, Kansas, and other real estate. Subject to taxes.

Elizabeth McElroy, widow,
to
Smedley Darlington.

Conveyance No. 11.—Mortgage, dated September 1st, 1886. Filed September 23d, 1886, in Book 29, page 45; consideration $3,000; for lots one and three, block 104, city Fort Scott, Kansas. Due 5 years; interest 7 per cent. per annum, semi-annually, March and September 1st.

Elizabeth McElroy, widow,
to
Henry J. Butler.

Conveyance No. 12.—Mortgage, dated September 1st, 1886. Filed September 24th, 1886, in Book 28, page 578; consideration $150; for lots one and three, block 104, city Fort Scott, Kansas. Due September 1st, 1891.

The following portions of the record in case No. 316 are part of the agreed statements of fact:

The Original Recognizance.

(After the caption.)

In this case the recognizance was as follows:

"Know all men by these presents, that we, Joseph H. Roe, C. A. Ruther and M. McElroy and Charles Bull, are jointly and
16 severally held and firmly bound unto the United States of America in the penal sum of two thousand dollars, lawful money, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Witness our hands and seals this third day of August, A. D. 1869.

The conditions of the above obligation are that, if the above-bounden Joseph H. Roe and C. A. Ruther shall each of them, be and appear, in his own proper person, before the United States district court, in and for the district of Kansas, at the next term thereof, and on the first day of said term, there to answer to a charge of wilfully and knowingly violating the internal revenue laws of the United States, and shall not depart said court without leave, and shall abide the judgment of said court therein, then the above obligation to be void, otherwise to be and remain in full force and effect.

C. A. RUTHER. [SEAL.]
J. H. ROE. [SEAL.]
M. McELROY. [SEAL.]
CHAS. BULL. [SEAL.]

Subscribed in my presence and approved this Aug. 3, 1869, at Fort Scott, Kansas.

W. A. SHANNON,
U. S. Com'r."

From the Journal of the Court.

Upon October 11, 1869, the following proceedings were had:

"UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the district court of the United States of America, for the district of Kansas, begun and held in the city of Topeka, in

said district, on Monday, the 11th day of October, 1869, proceedings were had and appear of record, in words and figures following, to wit:

Forfeiture of Recognizance.

TUESDAY, *October* 12, 1869.

THE UNITED STATES,
vs.
JOSEPH H. ROE, C. A. RUTHER, M. MCELROY, and CHARLES BULL. } 316.

Now comes the United States of America, by Albert H. Horton, United States district attorney, and the said defendants, Joseph H. Roe and C. H. Ruther, being three times solemnly called, come not, but herein fail and make default, and thereupon M. McElroy and Charles Bull, sureties of the said Joseph H. Roe and C. A. Ruther, on his recognizance herein, being also three times solemnly called and required to bring into court the bodies of the said Joseph H. Roe and C. A. Ruther, as they are bound to do by the tenor of the said recognizance, come not, nor do they produce the bodies of the said Joseph H. Roe and C. A. Ruther. Therefore it is considered by the court that the said recognizance be and the same is hereby forfeited against the said defendants, Joseph H. Roe and C. A. Ruther as principals, and against M. McElroy and Charles Bull, sureties aforesaid.

17

And thereupon it is ordered that a writ of *scire facias* issue against the said Joseph H. Roe, C. A. Ruther, M. McElroy and Charles Bull, requiring them to appear and show cause on the 30th day of October, A. D. 1869, at 10 o'clock a. m., why the said forfeiture should not be made absolute and execution issue to make the amount of the same according to the form, force and effect of the said recognizance."

And afterwards a writ of *scire facias* was issued as follows:

"THE UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

The United States of America to the marshal of the district of Kansas, Greeting:

Whereas Joseph H. Roe and C. A. Ruther, as principals, and M. McElroy and Charles Bull, as sureties, on the 3d day of August, A. D. 1869, were jointly and severally held and firmly bound unto the United States of America in the penal sum of two thousand dollars lawful money, to be void on condition that the said Joseph H. Roe and C. A. Ruther should each of them be and appear in his own proper person, before the United States district court in and for the district of Kansas, at the next term thereof, and on the first day of said term, there to answer to a charge of wilfully and knowingly violating the internal-revenue laws of the United States, and not

depart the said court without leave, and to abide the judgment of said court.

And whereas, on the first day of said term, to wit, October 11, 1869, the said Joseph H. Roe and C. A. Ruther wholly failed to keep the condition of said recognizance in this, that although called they failed to appear and answer the charge, and not depart the said court without leave thereof, whereby the condition of
18 said recognizance became and was forfeited on the 12th day of October, A. D. 1869, as appears by the record of said court.

You are therefore commanded to summon the said Joseph H. Roe, C. A. Ruther, M. McElroy and Charles Bull to appear before said court to be held in Topeka, in said district, before the judge of said court on the 30th day of October, A. D. 1869, at 10 o'clock a. m., to show cause, if any they can, why final judgment should not be rendered against them on said recognizance, and have you then and there this writ.

Witness the Hon. Mark W. Delahay, judge of said court, and the seal thereof affixed at Topeka, in said district, this 12th day of October, A. D. 1869.

A. S. THOMAS, *Clerk*."

Upon the said writ of *scire facias* the following return was made:

"Rec'd this writ Oct. 14, '69. Served the same Oct. 14, '69, by giving to the within-named M. McElroy a certified copy, and by leaving a certified copy, at the usual place of residence of the within-named Charles Bull.

D. W. HOUSTON,
U. S. Marshal,
By C. S. WHEATON, *Deputy*."

Thereupon the following motion was filed:

In the District Court of the United States for the District of Kansas.

Sci. Fa. on Recognizance.

THE UNITED STATES
vs.
JOSEPH H. ROE, C. A. RUTHER, M. MCELROY, and CHARLES BULL. } No. 316.

Now comes the defendants, M. McElroy and Charles Bull, appearing specially for the purposes of this motion and not otherwise, and move the court to quash the writ of *scire facias* herein for following causes, to wit:

1st. Said — is irregular and wholly void.

2d. No "petition" has been filed herein as required by the rules and practice of this court.

3d. The defendants are entitled to at least twenty days within which to answer, after service of process, whereas by the writ of

scire facias herein, and the service thereof, the defendants are given only twelve days' time to answer.

W. C. WEBB,
Att'y for Def'ts McElroy & Bull.

19 Indorsements as follows: 316. U. S. district court. United States *vs.* Joseph H. Roe, C. A. Ruther, M. McElroy and Charles Bull. Motion to quash *sci. fa.* Filed October 29, 1869. A. S. Thomas, clerk. W. C. Webb, att'y for def'ts McElroy and Bull.

Thereupon the following motion was filed:

In the District Court of the United States for the District of Kansas.

Motion on Sci. Fa. on Recognizance.

THE UNITED STATES, Plaintiff,
vs.
JOSEPH H. ROE, C. A. RUTHER, M. MCELROY, and CHARLES BULL, Defendants. } No. 316.

Now comes the said The United States and moves the court here to make final and absolute the forfeiture heretofore taken in this case against M. McElroy and Charles Bull, and that judgement be rendered therein against the said M. McElroy and Charles Bull.

ALBERT H. HORTON,
United States Attorney for District of Kansas.

Nov. 6th, 1869.

Indorsed as follows: 316. U. S. disc. court. United States *vs.* Joseph H. Roe, C. A. Ruther, M. McElroy and Chas. Bull. Motion to make forfeiture final and for judgement. Filed Nov. 6, 1869. A. S. Thomas, clerk. A. H. Horton, U. S. att'y.

The journal of the court shows the following entry:

SATURDAY, *November* 6, 1869.

"THE UNITED STATES
vs.
JOSEPH H. ROE, C. A. RUTHER, M. MCELROY, and CHARLES BULL. } 316.

Judgment.

Now comes The United States of America, by A. H. Horton, United States district attorney, and the said M. McElroy and Charles Bull, by their attorney, W. C. Webb, having filed their said motion herein to quash the said writ of *scire facias* issued in this case, thereupon comes on for hearing said motion, which being duly argued by the said A. H. Horton, is by the court overruled, and thereupon comes on for hearing the motion to make the motion final heretofore entered in this case against M. McElroy and Charles Bull, and

it appearing to the court that the said M. McElroy and Charles Bull had been duly served with the process of this court in said
20 cause and came not, but made default thereon after argument and the hearing of said cause. It is therefore considered and adjudged by the court that the forfeiture hereinbefore entered be made absolute against the said defendants, M. McElroy and Charles Bull, that the said plaintiff have and recover of and from the said defendants, M. McElroy and Charles Bull, the sum of two thousand dollars ($2,000), the amount in the recognizance herein specified, as also their costs in this behalf expended, and that for said amount and costs execution issue. And it is further ordered that alias *scire facias* issue against Joseph H. Roe and C. A. Ruther, returnable to the first day of the next term of said court, and that this cause stand continued."

Thereupon the following was filed:

In the District Court U. S. for Dist. of Kansas.

UNITED STATES
vs.
JOSEPH H. ROE, C. A. RUTHER, M. MCELROY, CHARLES BULL.

Precipe.

The clerk of the said court will make transcript of the record of proceedings on *sci. fa.* (No. 316) in the above case.

W. C. WEBB,
LEWIS HANBACK,
Att'ys for Def'd'ts.

Dec. 15, '69.

Indorsed: "Filed Dec. 15, 1869. A. S. Thomas, clerk."

Thereupon there was filed in said court the following paper:

"At a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 23d day of May, A. D. 1870.

Present: Hon. John F. Dillon and Hon. Mark W. Delahay, judges.

Proceedings were had and appear of record in words and figures as follows, to wit:

MONDAY, *May 23d*, 1870.

M. M. MCELROY and CHARLES BULL, Plaintiffs in Error,
vs. 221.
THE UNITED STATES, Defendant in Error.

Now come the plaintiffs in error, by Lewis Hanback, their attorney, and move the court that this case be dismissed, and the said defendant in error appearing by A. H. Horton, United States
21 district attorney, and making no objection thereto, it is ordered by the court that said petition in error be dismissed for want

of prosecution, and it is further ordered by the court that the judgment heretofore rendered in favor of the said United States against said plaintiffs in error in the district court of the United States for the district of Kansas, at the October term, A. D. 1869, be enforced as though no proceedings had been had in this court, and that a copy of this order be certified to the clerk of the district court of the United States for the district of Kansas.

To which is attached the following certificate:

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify that the above and foregoing is a true and correct copy and transcript from the record of the proceedings had in said court in the case of M. McElroy and Chas. Bull, plaintiffs in error, and United States, defendant in error, and that the costs accrued in said case amount to and — taxed — seventeen and $\frac{50}{100}$ dollars.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court at my office in the city of Topeka, in said district, this 31 day of May, A. D. 1870.

A. S. THOMAS, *Clerk.*

Indorsed upon said copy and certificate is: "Transcript and proceedings in circuit court on petition in error. Filed May 31, 1870. A. S. Thomas, clerk."

The following rule of court is also a part of this agreed statement of fact:

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the district court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 8th day of April, 1861, proceedings were had and appear of record, in words and figures following, to wit:

WEDNESDAY, *April* 10, 1861.

It is ordered by the court that the following rules and regulations be and they are hereby adopted in this court, viz:

* * * * * * *

Rule 2.

The practice and pleadings of this court shall conform as
22 far as may be to the law regulating the practice and pleading of the different courts in this State except in equity and admiralty cases.

In testimony whereof I hereunto set my hand and affix
[SEAL.] the seal of said court at Topeka, in said district, this 17th day of March, 1891.

J. C. WILSON, *Clerk.*

The foregoing is the agreed statement of facts.

(Signed) E. F. WARE,
Sol'r for Complainant.
J. D. McCLEVERTY,
Sol'r for Def'd'ts.

In the Circuit Court of the United States for the District of Kansas.

THE UNITED STATES, Complainant,
vs.
MARTHA INSLEY *et al.*, Defendants. } No. 4896.

RINER, *J.*:

This is a bill for an accounting and to redeem lot 1, block 104, in the city of Fort Scott. In July or August, 1869, Joseph H. Roe and C. A. Ruther were arrested upon a complaint charging them with violating the internal revenue laws of the United States. On the 3rd of August, 1869, they were placed under bond for their appearance before the United States district court for the district of Kansas, with one M. McElroy and one Charles Bull as sureties. The bond or recognizance is in the following language:

"Know all men by these presents, that we, Joseph H. Roe, C. A. Ruther and M. McElroy and Charles Bull, are jointly and severally held and firmly bound unto the United States of America in the penal sum of two thousand dollars, lawful money, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Witness our hands and seals this third day of August, A. D. 1869.

The conditions of the above obligation are that if the above-bounden Joseph H. Roe and C. A. Ruther shall each of them be and appear, in his own proper person, before the United States district court, in and for the district of Kansas, at the next term thereof, and on the first day of said term, there to answer to a charge of wilfully and knowingly violating the internal revenue laws
23 of the United States, and shall not depart said court without leave, and shall abide the judgement of said court therein, then the above obligation to be void, otherwise to be and remain in full force and effect.

C. A. RUTHER. [SEAL.]
J. H. ROE. [SEAL.]
M. McELROY. [SEAL.]
CHAS. BULL. [SEAL.]

Subscribed in my presence and approved this August 3, 1869, at Fort Scott, Kansas.

W. A. SHANNON,
U. S. Comm'r."

On the 12th day of October, 1869, that being the second day of the term, a forfeiture of this recognizance in due form was taken

and an order for a writ of *scire facias* was issued, returnable Oct 30. On the 6th of Nov., 1869, and at the same term, a motion was made to make the forfeiture final and for judgement, which was entered for the sum of two thousand dollars, the penalty of the bond. No suit was brought upon this bail bond, nor other proceedings had, except as above stated.

Before the rendition of the judgement McElroy, one of the sureties, had brought from one Bryant (the purchase being made Aug. 5th, 1869), lots 1 and 3, in block 104, in Fort Scott, the purchase price being six thousand dollars. At the time of this purchase, and to pay for this property, McElroy borrowed from one Palmer, three thousand five hundred dollars and gave a mortgage dated August 7th, 1869, upon these lots in Fort Scott to secure the loan.

April 27th, 1871, a *pluries* execution was ordered out on the judgement of Nov. 6th, 1869, in favor of the United States, and on May 2nd, 1871, the execution was levied upon these lots, one and three, in block 104, in Fort Scott.

May 30th, 1871, Palmer brought suit to foreclose his mortgage, but did not make the United States a party defendant.

Service of summons was made on McElroy and wife May 31st, 1871.

June 6th, 1871, at a sale under said *pluries* execution, the United States bought said lot in satisfaction of its debt.

October 4th, 1871, Palmer obtained judgement of foreclosure in the sum of $3,764.16 and costs.

24 October 16th, 1871, the sale to the United States was confirmed and deed ordered made. The deed was subsequently made.

October 25th, 1871, Palmer ordered out execution against McElroy.

December 4th, 1871, the property was sold under the Palmer execution and bid in for the debt by Palmer. The sale was confirmed, and on January 4th, 1872, a sheriff's deed was made to Palmer.

Here occurs an interregnum of over twelve years. This suit was brought November 28th, 1884. The United States has never been in possession of said property.

The attitude of the title on January 4th, 1872, was:

First. The property had been sold to the United States by sale confirmed October 16th, 1871, on a second lien.

Second. The property had been sold to Palmer by sale confirmed December 26, 1871, on a first lien, the United States not being a party defendant.

Between January 4th, 1872, and the filing of this bill, on November 28th, 1884, McElroy and wife remained in possession of said lot, with the consent of Palmer, under an agreement to purchase, until the death of Palmer, November 13th, 1872, after which the agreement lapsed. Afterwards the Palmer heirs desired to sell, and they made another agreement with McElroy, who acted as agent for his wife, that they would sell the lots to Mrs. McElroy, defendant herein. Payments on the property begun and slowly progressed

through a series of years. The property had an earning capacity, and the rents and profits went to Moses McElroy. He died August 24th, 1881, leaving the property partly unpaid for.

In the agreed statement of fact it is admitted that the said agreement with the Palmer heirs vested the title and ownership of said lot "in the said defendant, Elizabeth McElroy, except as affected by the claim or interest of the complainant in this action, if it shall be determined any such claim or interest exists.

The payments of Polly Palmer and her estate of the purchase price were made by Moses McElroy from his own funds while living, and from the same sources the taxes were paid until the bringing of this action.

After the agreement of purchase had been made by Elizabeth McElroy she improved the lots by erecting certain buildings thereon, at an expenditure of several thousand dollars, and has ever since paid all taxes and assessments levied upon said property and has also collected the rents and enjoyed the use and benefit of the property, and the rents and profits so received and enjoyed by the said Elizabeth McElroy since her purchase of said lots exceeds by a small amount the principal and interest that would now be due under the said mortgage of August 7th, 1869, by way of redemption, and also exceeds in addition thereto the total amount expended by the said Elizabeth McElroy since her said purchase for improvements made and taxes paid upon said property, with interest to date."

The property was finally deeded by the Palmer heirs to Mrs. McElroy about five years after her husband's death, and after the filing of this bill.

All of the defendants, except Elizabeth McElroy, have disclaimed any interest in the property in dispute. Upon these facts two questions are submitted to the court for determination: First, was the judgement of May 2nd, 1871, a valid judgement? Second, was it necessary to revive the original action before the marshal could make a valid deed, McElroy, the original defendant, having died between the date of the levy and sale and the date of the deed.

Sec. 1014 of the United States Revised Statutes provides that for any crime or offense against the United States the offender may, by any justice or judge, commissioner, etc., in any State where he may be found and agreeable to the usual mode of process against offenders in such States, be arrested, imprisoned or bailed, as the case may be, etc.

While the instrument upon which the judgement in favor of the United States was rendered is called a recognizance, yet technically it is not, but is a bail bond or contract. A recognizance is an obligation of record. This security, call it what we may, was a recognizance or bail bond taken agreeable to the mode of process against offenders in the State of Kansas at that time, and was a valid obligation under the laws of the State. The parties failed to appear in the proper court at the time specified in the bond and the bond was properly forfeited. The security having been taken agreeable to the usual mode of process in the State of Kansas, the rights of

the parties became fixed thereby, and the liability of these sureties upon this bond must be determined under the statues of the State of Kansas, in force at that time, sec. 153, chap. 82, General Statutes of Kansas. which it is conceded was in force at the time this bond was taken, provides a remedy by action after the adjournment of the court against the bail and upon the recognizance. And
26 that the action shall be governed by the rules of civil pleading, so far as applicable. Sec. 149 of the same chapter provides that the bail (that is the surety) at any time before judgement against him may surrender his principal, either to the court or the sheriff (or marshal in this case) and upon payment of the costs may thereupon be discharged from further liabilty upon the recognizance. Thus it will be seen that by the laws of Kansas in force at the time this bond was taken, the only remedy upon a forfeited recognizance was by action in the nature of a civil action. And that this action could be commenced only after the adjournment of the court at which the forfeiture was taken, for the surety had the entire term at which the forfeiture was taken to surrender his principal, pay the costs and be discharged. This right the sureties were deprived of by the proceedings had in the district court upon the forfeiture of this recognizance. The proceedings there had were not authorized by the statutes of Kansas, nor by any law of the United States to which my attention has been called, and the judgement there entered, for the reasons above stated, had no validity.

McElroy, the original defendant, having died between the date of the levy and the date of the deed, it was necessary to revive the action before a valid deed could be executed.

A decree will go for the defendant quieting the title to the property in dispute in her, but not at the cost of the complainant.

Indorsed. #4896. Opinion. Filed Feby. 29, 1892. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 23d day of November, 1891, proceedings were had, and appear of record, in words and figures following, to wit:

MONDAY, *February* 29, 1892.

THE UNITED STATES, Complainant,
vs.
Mrs. MARTHA INSLEY, Formerly Martha Palmer; Mrs. LAURA Gullick, Formerly Laura Palmer; Mrs. Barbary R. Palmer, and James Palmer, Heirs-at-law of Polly, Deceased; Mrs. Elizabeth, Wife and Heir-at-law of M. McElroy, Deceased, and Eliza J. McElroy, Emma G. McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, Heirs-at-law of M. McElroy, Deceased, and Mrs. Elizabeth McElroy, as Administratrix of M. McElroy, Deceased, and E. Nold, Defendants. } 4896.

Now at this day this cause came on for hearing upon the
27 bill, answer and testimony, the *paid* complainant appearing by Hon. E. F. Ware, solicitor and special counsel for the United States; the said defendants by J. D. McCleverty, and the court, upon consideration thereof, doth find that the alleged judgment in favor of complainant as entered upon the records of the United States district court for said district of Kansas, on the 6th day of November, A. D. 1869, in the case entitled The United States *vs.* Joseph H. Roe, C. A. Ruther, M. McElroy and Charles Bull, under which said complainant claims in this suit is void and of no force or effect and creates no lien upon the property mentioned and described in complainant's bill, to wit: Lot No. one (1), in block No. one hundred and four (104), in the city of Fort Scott, Bourbon county, State of Kansas; that the said defendant, Elizabeth McElroy, is the owner in fee simple and in the possession of said real estate, and is entitled to have her said title and possession quieted as against complainant's claim and to have all its alleged claim and title conveyed to her. The value of the said lot 1, as admitted by the parties, was and is exceeding $5,000.00. It is therefore now considered, ordered, adjudged and decreed that the said complainant be and is hereby forever restrained and enjoined from the holding, claiming or asserting any lien, right, title or interest in, to or against the said lot No. one (1), in block No. one hundred and four (104), in the city of Fort Scott, Bourbon county, State of Kansas, and the title of the said defendant, Elizabeth McElroy, in and to said real estate is forever quieted as against any and all claim, title or interest of said complainant in or to the same, and the said complainant shall convey the same to the said Elizabeth McElroy, and in default thereof this decree shall stand and operate as such conveyance. Further, the said judgment, as it appears of record in said district, is hereby ordered to be canceled and satisfied by said complainant and it is hereby enjoined from any further proceedings thereunder. It is further ordered that the United States marshal for this district shall, at the request of said Elizabeth McElroy, execute and deliver to her a proper deed of release, carrying this decree into effect upon the payment by her of the costs of such deed, and the complainant's bill is hereby dismissed.

JOHN A. RINER, *Judge.*

In the U. S. Circuit Court, District of Kansas.

Assignment of Errors.

THE UNITED STATES, Complainant,
vs.
MARTHA INSLEY *et al.*, Defendants.

Now comes the complainant and says that there is manifest error in the decree and record in this case, and makes the following assignment of errors:

28 1st. The court erred in holding that the said judgment of the U. S. district court dated November 6, 1869, was invalid.

2d. The court erred in permitting the said judgment to be impeached collaterally in this action.

3d. The court erred in setting aside the marshal's deed issued upon a sale made June 6, 1871, under said judgement, and confirmed by the said district court Oct. 16, 1871.

4th. The court erred in holding that it was necessary to revive said judgement after levy, sale and confirmation, but before deed was issued.

5th. The court erred in quieting the title of said property in the defendant.

For which errors the appel-ant prays that the said decree be reversed, and a decree be entered for the complainant that the sum of $2,000 with interest at the rate of 7 per cent. per annum from Nov. 6, 1869, be paid the complainant within a time to be fixed by the court, and that it is made a first lien, until paid, upon the property mentioned in the complaint.

J. W. ADY,
U. S. Dist. Att'y, and
E. F. WARE,
Special Counsel U. S.

Indorsed: No. 4896. U. S. *vs.* Insley. Assignment of errors. Filed April 22, 1892. Geo. F. Sharitt, clerk.

In the Circuit Court, Dist. of Kansas.

Petition for Appeal.

THE U. S., Complainant,
vs.
MARTHA INSLEY *et al.*, Defendants.

Your petitioner, The United States of America, the complainant in the above-entitled cause, would respectfully represent and show that in the above-entitled cause pending in the United States circuit court in and for the district of Kansas, there was entered on March 2d, 1892, at the November term, 1891, of said court *of* final decree greatly to the prejudice and injury of your petitioner, which said decree is erroneous and inequitable in many particulars.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that he may be allowed an appeal in
29 said cause to the circuit court of appeals for the eighth judicial circuit. And that the proper orders touching the security required of him may be made.

E. F. WARE,
Special Sol'r for Complainant.

Issuance of citation waived.

J. D. McCLEVERTY,
Def'ts' Sol.

Appeal allowed as prayed for in the foregoing petition April 22nd, 1892.

JOHN A. RINER, *Judge.*

Indorsed: No. 4896. Prayer and allowance of appeal. Filed April 22nd, 1892. Geo. F. Sharitt, clerk.

This is a full, true and correct copy of the record and proceedings in this case.

E. F. WARE,
Sol'r for Comp.
J. D. McCLEVERTY,
Sol'r for Def'ts.

UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the suit of The United States of America, complainant *vs.* Mrs. Martha Insley, formerly Martha Palmer, and others, defendants. Number 4896.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 27th day of April, A. D. 1892.
GEO. F. SHARITT, *Clerk.*

Filed May 2, 1892.

JOHN D. JORDAN, *Clerk.*

30 And on the second day of May, A. D. 1892, an appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals in the words and figures following:

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES, Appellant,
vs.
MARTHA INSLEY *et al.*, Appellees.

Entry of Appearance.

The clerk will please enter my appearance as counsel for the appellant in the above-entitled case.
Ap'l 30, 1892.

E. F. WARE,
Special Counsel for Appellant.

Endorsed: No. 125. United States, appellant, *vs.* Mrs. Martha Insley *et al.* Appearance of counsel for appellant. Filed May 2, 1892. John D. Jordan, clerk.

And on the second day of May, A. D. 1892, an appearance of counsel for appellees was filed in the clerk's office of said circuit court of appeals in the words and figures following:

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES, Appellant,
vs.
MARTHA INSLEY *et al.*, Appellees.

Entry of Appearance.

The clerk will please enter my appearance as counsel for the appellee in the above-entitled case.
Ap'l 30, '92.

J. D. McCLEVERTY,
Def'ts' Sol.

Endorsed: No. 125. United States, appellant, *vs.* Mrs. Martha Insley *et al.* Appearance of counsel for appellee. Filed May 2, 1892. John D. Jordan, clerk.

31 And on the fourth day of October, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

TUESDAY, *October* 4, 1892.

UNITED STATES OF AMERICA, Appellant,
vs.
MRS. MARTHA INSLEY, Formerly MARTHA PALMER, *et al.*, Appellees.

Appeal from the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, the appellees, by Mr. J. D. McCleverty, counsel, move for a dismissal of this cause for failure to prosecute the appeal; which said motion is submitted to the court without argument.

And on the fifth day of October, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an order of dismissal in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

WEDNESDAY, *October* 5, 1892.

UNITED STATES OF AMERICA, Appellant,
vs.
MRS. MARTHA INSLEY, Formerly MARTHA PALMER, *et al.*, Appellees.

Appeal from the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas, and the appellants having been three times solemnly called
32 to come into court and prosecute its said appeal, and failing to appear, it is thereupon, in pursuance of the 22nd rule of this court and on the motion of Mr. J. D. McCleverty, of counsel for the appellees, now here ordered and decreed by this court that this cause be, and the same is hereby, dismissed, and that this cause be, and the same is hereby, remanded to the said circuit court to be proceeded — in accordance to law and justice.
October 5, 1892.

And on the twenty-sixth day of October, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals a notice of motion to reinstate case on docket in the words and figures following, to wit:

FORT SCOTT, KANSAS, *Oct.* 19, 1892.

Hon. J. D. McCleverty, att'y for def'd'ts in the case of United States *vs.* Insley *et al.*

DEAR SIR: Upon October 10th, 1892, I served upon you a copy of the following motion:

United States Circuit Court of Appeals.

UNITED STATES, Pl'ff in Error,
vs.
MARTHA INSLEY *et al.*, Def'd'ts in Error. } Motion.

Now comes the plaintiff and asks the court to reinstate the above-entitled case, and says—

That said case was erroneously stricken from the docket, and plaintiff asks to be allowed to immediately print the record in said action.

E. F. WARE,
Att'y for Pl'ff in Error.

In a notice served with this motion I said that the said motion would be called up on October 17th, or as soon thereafter as counsel could be heard. The papers were forwarded through the office of the United States district attorney at Topeka, but seem to have been mislaid or to have been lost in the mails between Topeka
33 and Saint Paul.

This is to advise you of the reason why the matter has not been called up sooner, and to say that it will be called up at St. Paul, in the U. S. court of appeals, upon Monday, October 31st, 1892, or as soon thereafter as counsel can be heard.

Very respectfully,

E. F. WARE,
Sp'l U. S. Att'y.

Service of a copy of the above served upon me this 19th day of Oct., 1892.

J. D. McCLEVERTY,
Def'ts' Att'y.

Endorsed: No. 125. United States, appellant, *vs.* Mrs. Martha Insley *et al.* Notice of motion to reinstate case on docket. Filed Oct. 26, 1892. John D. Jordan, clerk.

And on the thirty-first day of October, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals motion and affidavits to reinstate case on docket in words and figures following, to wit:

In the U. S. Circuit Court of Appeals.

THE UNITED STATES, Pl'ff in Error,
vs.
MARTHA INSLEY *et al.*, Defendants in Error.

Motion.

Now comes the plaintiff in error and asks the court to reinstate the above-entitled case, and says that said case was erroneously stricken from the docket, and plaintiff in error asks to be allowed to immediately print the record in said action.

E. F. WARE,
Sp. Att'y for Pl'ff in Error.

E. F. WARE, *Attorney.*

FORT SCOTT, KANSAS, *Sept.* 29, 1892.

34 P. L. Soper, Esq.

DEAR SIR: I have not heard from you regarding that St. Paul matter and the calling up of a motion by Mr. McCleverty, on October 4th, to dismiss our Insley case because no printed record has been made. I wonder if you could not write up to the United States attorney at St. Paul and have him see that the case goes over. There is no sense in the proposed motion of Mr. McCleverty.

The case was taken up during the spring to be filed in the court of appeals at its October setting, in St. Louis, which will be October the 10th. The case is not regularly upon the docket. The Government has evidently been busy and has not got around to the printing of the record, although I wrote to have it printed. I ordered the clerk of the court to have it printed and I also notified the U. S., through you. It looks to me that a simple letter written up to the U. S. attorney at St. Paul ought to be sufficient to have that case retained on the docket until the U. S. had time to print the record and get around to the business.

Yours very truly, E. F. WARE.

U. S. *vs.* Insley.
Joseph W. Ady, U. S. attorney.
Pliny L. Soper, assistant U. S. attorney.

UNITED STATES ATTORNEY'S OFFICE,
DISTRICT OF KANSAS,
TOPEKA, KANSAS, *Sept. 30th*, 1892.

In response to yours, United States attorney, St. Paul, Minn.

SIR: I enclose a letter, which is addressed to this office, in regard to the case of U. S. *vs.* Insley *et al.*, which is to be heard upon motion in your city October 4th, as explained in the letter. Please be kind enough to see that the case goes over, as requested in Mr. Ware's letter.

Very respectfully, J. W. ADY,
U. S. Attorney.

Please return letter.

35 UNITED STATES OF AMERICA, Appellant,
vs.
Mrs. MARTHA INSLEY, Formerly MARTHA PALMER, *et al.* } #125.

UNITED STATES OF AMERICA,
District of Minnesota, } *ss:*

U. S. Circuit Court of Appeals.

J. M. Dickey, being duly sworn, on oath says that he is clerk in the office of the United States district attorney for the district of Minnesota and has been for a year last past; that on or about the 1st day of October, A. D. 1892, in the absence of the United States attorney and his assistant, a letter came to the office of the United States attorney for said district from John W. Ada, United States attorney for the district of Kansas, which letter is hereto attached, marked "Exhibit A," to which reference is asked; that on receipt of said letter affiant proceeded to the office of the clerk of the said circuit court of appeals to inquire concerning the status of said case of the said clerk of the circuit court of appeals and ascertained that he was absent, but found entered on the calendar of the said circuit court of appeals the letters "cont.," where the case was entered on said calendar, and supposed from that entry that the case had been continued, and, as the assistant United States attorney for the district of Kansas desired the case continued, this affiant supposed that nothing further was necessary for him to do, and did not notify either Mr. Hay or his assistant in regard to the same until after the case was stricken from the calendar.

J. M. DICKEY.

Subscribed and sworn to before me this 31st day of October, A. D. 1892.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

BOURBON COUNTY,
State of Kansas, } *ss:*

E. F. Ware, being first duly sworn, on oath deposes and says: I am engaged in the practice of law at Fort Scott, Kansas. I
36 was appointed by the Attorney General as a special attorney to assist in the prosecution of the case of United States *vs.* Insley *et al.*, which involved the title to certain land in this county, and to make reports to the United States district attorney of Kansas.

The case has been running for several years; the United States was defeated; the case was taken to the United States Supreme Court and reversed; it was then afterwards tried in the United States circuit court the second time, and for a second time the United States circuit court decided against the United States. It was then taken to the United States circuit court of appeals upon petition in error. In my judgment it will be again reversed. The amount involved exceeds $5,000.00, and the costs so far have been considerable. At the last trial in the Federal court an agreed state-

ment of facts was arrived at, it being the result of the former trial, and the case was presented in this court upon the pleadings and agreed statement of facts. The case was filed in the court of appeals on May 2nd of this year, being a few days after it was tried in the court below. Upon the day that the said case was filed in this court I directed the record to be printed by the clerk and the requisite number to be sent to parties. Upon the same day Mr. Jordan, clerk of the court, wrote me that there was no provision for the printing of Government cases in the court of appeals, and that the Attorney General has issued instructions in regard to having the record printed. I received the letter and immediately afterwards, upon May 7th, 1892, wrote to the United States district attorney to notify and advise the Attorney General that the record had been filed and that it should be printed, and asked that an order be given from Washington to have it printed immediately, and I stated that the estimated cost of the printing would be $50.00. Upon the receipt of this letter the United — district attorney of Kansas wrote to me that he had carried out my instructions and had written to the Attorney General, and that the Attorney General would act in the matter, of which I would be in time duly advised.

37

Afterwards, upon the promulgation of the rule of the court of appeals, I supposed as a matter of course that the case would go to the December term of the court and that the order would not be made retrospective; hence I supposed that there was plenty of time in which to print the record before the term of the court, and I did not write letters urging the record to be printed, but expected to do so if it was not done soon.

About the 1st of October (I cannot give the date accurately) the attorney for the opposite party notified me that he would call up the case for dismissal on the ground that the record was not printed nor briefs served. I immediately wrote to the United States attorney for the district of Kansas, sending him all the papers and statement of the facts. The United States attorney notified me that my letter was received and that the papers had been forwarded to United States district attorney of Minnesota, who would give the matter prompt attention and be on hand when Mr. McCleverty's motion for dismissal should be called up. Upon October 7th or 8th I was notified that the motion had been called up and decided and that nobody had appeared; whereupon I advised United States attorney of Kansas, and he wired me that the papers had been lost in transmission, and that the United States attorney at St. Paul had not received my papers and for me to immediately duplicate them, which I immediately did. The great trouble seems to have arisen in the loss of papers in the mail, because had it not been so the case would have been presented.

My interpretation of the change of rule 3 was that the court would not try a case for a term set at a different place and beginning back on a day that the suit was filed. As the rule was promulgated in June and referred to a May term I supposed it had reference to the first May after the amended rule. I did not suppose

that in June a term of court would be created that would
38 precede the date of the rule.

There is plenty of time for the filing of the record and the printing of the briefs before the case can be reached in its regular order upon the December docket, and it will be immediately printed if the court will set aside the order for dismissal.

E. F. WARE.

Sworn to and subscribed to before me this Oct. 26, 1892.

J. M. LIMBOCKER,
[SEAL.] *Notary Public.*

My commission expires Oct. 17th, 1893.

Endorsed: No. 125. United States, appellant, *vs.* Mrs. Martha Insley *et al.* Motion and affidavits to reinstate case on docket. Filed Oct. 31, 1892. John D. Jordan, clerk.

And on the thirty-first day of October, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

MONDAY, *October* 31, 1892.

THE UNITED STATES, Appellant,
vs.
Mrs. MARTHA INSLEY *et al.*, Appellees. } No. 125.

Appeal from the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the motion of appellant to set aside the order of dismissal heretofore entered herein and to reinstate this cause on the docket. Mr. Geo. B. Edgerton appears in behalf of counsel for appellant and Mr. H. J. Fletcher in behalf of counsel for appellees.

And the court being advised in the premises, it is, on consideration thereof, now here ordered by this court that the order of
39 dismissal entered in this cause on the fifth day of October, 1892, be, and the same is, set aside and vacated, and that this cause be, and the same is hereby, reinstated on the docket of this court under its original number. It is further ordered that this case be set for hearing at the December term, 1892, at St. Louis, and assigned for hearing on the 23rd day of January, 1893.

And on the twenty-third day of January, A. D. 1893, in the record of the proceedings of said circuit court of appeals is an entry in said cause in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

MONDAY, *January* 23*rd*, 1893.

THE UNITED STATES, Appellant,
vs.
Mrs. MARTHA INSLEY *et al.*, Appellees. } No. 125.

Appeal from the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. E. F. Ware, counsel for appellant; continued by Mr. J. D. McCleverty, counsel for appellees, and concluded by Mr. E. F. Ware in behalf of appellant.

Thereupon this cause was submitted to the court upon the transcript of the record from said circuit court and the briefs of counsel filed herein.

And on the sixth day of February, A. D. 1893, an opinion of said United States circuit court of appeals was filed in said cause in the words and figures following, to wit:

40 United States Circuit Court of Appeals, Eighth Circuit.

No. 125. December Term, A. D. 1892.

THE UNITED STATES OF AMERICA, Appellant,
vs.
Mrs. MARTHA INSLEY, Formerly MARTHA PALMER, *et al.*, Appellees. } Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. E. F. Ware, special attorney, for appellant.
Mr. J. D. McCleverty, for appellees.

Before Caldwell and Sanborn, circuit judges, and Thayer, district judge.

Statement.

This is a bill filed by the United States for an accounting, and to redeem a piece of property situated in the city of Fort Scott, State of Kansas, which is now, and for many years last past has been, in the possession of Elizabeth McElroy. The facts on which the right of redemption is predicated are as follows: On the 3rd day of August, 1869, Moses McElroy became surety in a bond before a United States commissioner in the penal sum of $2,000.00 for the appearance of Joseph H. Roe and C. A. Ruther before the United States district court for the district of Kansas at its next term, to be held in October, 1869, to answer to the charge of wilfully violating the internal revenue laws of the United States. The bond in question appears to have been duly returned to, and to have been filed in, the United States district court for the district of Kansas, and on the

12th day of October, 1869, it was declared forfeited by said court for the failure of the principals therein to appear. A *scire facias* was thereupon issued by said court and was made returnable October 30th, 1869. The writ of *scire facias* was duly served on McElroy on October 14th, 1869, and on the 6th day of the following No-
41 vember final judgment appears to have been entered on the bond against McElroy, and against another surety who was also duly served, in the sum of $2,000.00 and costs. Under the judgment last aforesaid a *pluries* execution was issued on the 27th day of April, 1871, and at a sale made under said execution the United States became the purchaser on June 6th, 1871. The sale thus made was approved by the United States district court for the district of Kansas on the 16th day of October, 1871, and a deed was then ordered to be executed, but such deed was not in fact made until October 30th, 1883, after the death of McElroy, the judgment debtor.

The lot in controversy appears to have been acquired by purchase by McElroy on the 5th day of August, 1869, and to have been mortgaged by McElroy and wife on the day succeeding the purchase to one Polly Palmer for the sum of $3,500.00. On the 30th of May, 1871, Polly Palmer brought an action against McElroy and wife to foreclose said mortgage in the district court of Bourbon county, Kansas, in which proceeding a judgment and decree of foreclosure was duly entered against McElroy and wife on the 4th day of October, 1871. On the 25th of October, 1871, an order of sale was issued in said cause, and at a sale had thereunder on the 4th day of December following, Polly Palmer became the purchaser of the lot now in dispute for the sum of $3,786.06, which sale was approved and a deed was duly executed to Polly Palmer on the 4th of January, 1872. It is conceded that the title thus vested in Polly Palmer was subsequently transferred to Elizabeth McElroy, one of the defendants in this suit, and that she held such title and was in possession of the premises in controversy at the time the United States filed its bill to redeem on the 24th of November, 1884. The United States was not made a party to the suit brought by Polly Palmer to foreclose the mortgage above referred to.

THAYER, district judge, after stating the facts as above, delivered the opinion of the court:

When this case was before the Supreme Court of the United States on appeal from a former decree of the circuit court dismissing the bill, it was held that the appellees could neither invoke the plea of laches or limitations as a defense to the right of the United States to redeem. United States *v.* Insley, 130 U. S., 263. We are relieved therefore of the necessity of considering such defenses, and will confine our attention to the question whether the second decree dismissing the bill can be sustained upon the ground on which the circuit court appears to have rested its decision. The circuit court held in effect that a bail bond or recognizance taken in a Federal court or before a United States

commissioner sitting in Kansas, for the appearance before a United States court of that district of a person charged with an offense against Federal laws, can only be enforced in the mode prescribed by the laws of Kansas; that by the statutes of that State (sec. 5218, R. S. of '89) such bonds and recognizances can only be enforced by a civil action brought in some court of competent jurisdiction, after the lapse of the term at which the forfeiture is declared; and that the judgment in favor of the United States against McElroy
42 was null and void, and not merely voidable, because it was rendered on *scire facias* and before the adjournment of the term at which the forfeiture was declared. As the view thus entertained by the trial court places the Federal courts in a condition of practical dependence upon local laws in a matter which is intimately connected with the efficient exercise of their criminal jurisdiction, we think it should not be adopted, unless it is clearly warranted by some Federal statute.

It has frequently been held that United States commissioners derive their power to take bail for offenses against the laws of the United States from sec. 1014 of the Revised Statutes of the United States. That section provides that "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge, * * * or other magistrate of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense." By reason of the provision contained in that section, that Federal judges and commissioners shall proceed "agreeably to the usual mode of process against offenders in such State," it has also been held, that the purpose was to assimilate all proceedings for holding accused persons to bail to answer before a court of the United States, to the proceedings in vogue for similar purposes in the State where the proceeding should take place. It has accordingly been ruled that recourse must be had to the laws of the State where an examination is held, to determine a commissioner's power to take bail for an appearance before himself, as well as to determine his right to adjourn a hearing, and the length of time such hearing may be adjourned. U. S. *v.* Rundlett, 2 Curtis, 41, 48; U. S. *v.* Chase, 8 Blatchford, 250; U. S. *v.* Martin, 17 Fed. Rep. 150; U. S. *v.* Horton, 2 Dillon, 94. The decisions construing sec. 1014 have thus far only gone to the extent of holding that State laws control as to all questions of procedure before a United States commissioner up to the time the proceedings are certified to the court having jurisdiction to try the offense. But it has never been decided, so far as we are aware, that in enforcing a forfeited recognizance or bond taken in a criminal case, the United States is restricted to those remedies which are provided by the laws of the State where the court happens to be held. As certain State magistrates were authorized by sec. 1014 to commit persons for trial who were accused of offenses against the laws of the United States, it was eminently proper to provide

that in the discharge of such duties they might proceed in accordance with State laws, with which they were familiar. But no reason exists for limiting the Federal courts when proceeding to enforce a forfeited recognizance or bond which has been taken or duly lodged therein, to those remedies which are prescribed by State statutes. In the trial and disposition of criminal cases the Federal courts proceed according to the course of the common law as modified by acts of Congress. It has recently been held that the competency of witnesses in criminal trials in the courts of the United States is not governed by the stat-
43 utes of the State where such trials are had, but is to be determined by the common law. Logan *v.* United States, 144 U. S., 263, 303; see also U. S. *v.* Reid, 12 Howard, 361, 363. We think there is equal reason for holding that the courts of the United States may resort to such remedies for enforcing a bond or recognizance which has been duly returned by a Federal commissioner or other committing magistrate, as are given by the common law. The Federal courts, we believe, have heretofore acted upon the assumption, and with great unanimity, that in the matter of enforcing a forfeited bond or recognizance, it was proper to issue a *scire facias* and to enter a final judgment against the principal and his sureties on the return of such process duly served, if no sufficient cause was shown for setting aside the forfeiture. That is one of the approved common-law methods of enforcing such obligations after a forfeiture is declared, and it has on some occasions been supposed that it was the only appropriate method, although it is now well settled that an original action may also be brought on bonds of that character. Commonwealth *v.* Green, 12 Mass., 1; Commonwealth *v.* McNiel, 19 Pickering, 127. We are constrained to hold therefore that the judgment against McElroy in the sum of $2,000, which was rendered by the United States district court for the district of Kansas on the 6th day of November, 1869, was a valid judgment, and that it was not even voidable.

Another position was taken by the defendants in the circuit court, and seems to be relied upon in this court, that the marshal's deed to the lot in controversy, which was executed after the death of McElroy, is void and conveys no title for the reason that the action was not revived in the name of his heirs or legal representatives before the deed was executed. With reference to that contention it is only necessary to say that as the sale of the lot was made and approved and a deed was ordered to be executed during the lifetime of McElroy, we do not perceive that the right of the United States to redeem is in any way impaired, even though it be true that the deed is in fact void. The deed is the mere evidence of transactions that had been fully consummated in the lifetime of the judgment debtor. But we are unwilling to concede that the deed is defective for the reasons above stated and urged. The law seems to be quite well settled that a deed made under such circumstances is valid notwithstanding the failure to revive. Herman on Executions, sec. 213, and citations. The decree of the circuit court is therefore reversed, with directions to enter a decree in favor of the

United States in such form as the parties have heretofore stipulated shall be entered, in case the right of the United States to redeem was sustained.

Filed February 6, 1893.

44 And on the sixth day of February, A. D. 1893, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

MONDAY, *February 6th*, 1893.

THE UNITED STATES OF AMERICA, Appellant,
vs.
Mrs. MARTHA INSLEY, Formerly MARTHA PALMER; Mrs. LAURA Gullick, Formerly Laura Palmer; Mrs. Barbary R. Palmer and James Palmer, Heirs-at-law of Polly, Deceased; Mrs. Elizabeth, Wife and Heir-at-law of M. McElroy, Deceased, and Eliza J. McElroy, Emma G. McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, Heirs-at-law of M. McElroy, Deceased, and Mrs. Elizabeth McElroy, as Administratrix of M. McElroy, Dec'd, and E. Nold, Appellees.

Appeal from the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, without costs to either party.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to enter a decree in favor of the United States in such form as the parties have heretofore stipulated shall be entered in case the right of the United States to redeem was sustained.

February 6, 1893.

45 And on the twenty-eighth day of February, A. D. 1893, there was filed in the clerk's office of said circuit court of appeals in said cause a petition for allowance of appeal in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Appellant,
vs.
MARTHA INSLEY *et al.*, Appellees.

Petition for Appeal.

Your petitioners, the said appellees above named, and especially Elizabeth McElroy, would respectfully represent and show that in the above-entitled case pending in the said court a decision and decree was rendered on the 6th day of February, 1893, reversing the decree of the United States circuit court for the district of Kansas, and greatly to the prejudice and injury of your petitioners, and which said decree is erroneous and inequitable in many particulars; that it is a suit to redeem brought by said appellant and involving no present or future personal liabilities upon the part of any of said appellees.

Wherefore, in order that your petitioner- may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray that they may be allowed an appeal in said case to the Supreme Court of the United States, and that proper orders touching the security required may be made.

J. D. McCLEVERTY,
Solicitor for Appellees.

Endorsed: No. 125. United States of America, appellant, *vs.* Mrs. Martha Insley *et al.* Petition for allowance of appeal to Supreme Court U. S. Filed Feb. 28, 1893. John D. Jordan, clerk.

46 And on the twenty-eighth day of February, A. D. 1893, there was filed in the clerk's office of said United States circuit court of appeals an assignment of errors in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Appellant,
vs.
MARTHA INSLEY *et al.*, Appellees.

Assignment of Errors.

Now come the said appellees above named, and especially Elizabeth McElroy, and say that there is manifest error in the decision and decree in this case in this, to wit:

1. That said court erred in holding the said judgment of the United States district court set out in the record herein to be a good and valid judgment.

2. That said court erred in sustaining said judgment and decreeing that it be enforced and held a lien as prayed for.

3. That the court erred in sustaining as valid the marshal's deed as set out in the record herein; that the court erred in ordering a

decree herein for the appellant, The United States of America, and in reversing the judgment and decree of the court below.

4. That the court erred in not sustaining and affirming the judgment and decree of the lower court, the circuit court of the United States for the district of Kansas.

5. That said court erred in holding that the facts and testimony herein showed any equity in appellant, The United States of America, or that it was entitled to any equitable relief herein.

For which errors the appellees pray that the said decision and decree of said court of appeals be reversed, and that these appellees, and especially Elizabeth McElroy, be restored to all things lost thereby.

J. D. McCLEVERTY,
Appellees' Solicitor.

47 Endorsed: No. 125. The United States *vs.* Martha Insley *et al.* Assignment of errors. Filed Feb. 28, 1893. John D. Jordan, clerk.

And on the first day of March, A. D. 1893, there was filed in the clerk's office of said circuit court of appeals an order allowing appeal in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

WEDNESDAY, *March 1st*, 1893.

THE UNITED STATES OF AMERICA, Appellant,
vs.
MRS. MARTHA INSLEY, Formerly MARTHA PALMER, *et al.*, Appellees. } No. 125.

Appeal from the circuit court of the United States for the district of Kansas.

Now, on this day, come the appellants, Mrs. Martha Insley *et al.*, and file their assignments of error and pray for an appeal to the Supreme Court of the United States from the decree of this court entered on the sixth day of February, 1893.

Whereupon it is ordered that an appeal be allowed as prayed for and supersedeas allowed, with stay of mandate pending the appeal, upon the filing of a bond by said appellants in the sum of two thousand five hundred dollars within sixty days from this date, conditioned that Martha Insley *et al.*, appellants, shall prosecute their appeal to effect and answer all damages and costs if they fail to make good their plea, and conditioned further that they will not do or suffer any waste to be done or committed upon the property mentioned and described in the bill of complaint.

March 1st, 1893.

(Signed) HENRY C. CALDWELL,
U. S. Circuit Judge, Eighth Circuit.

48 And on the twelfth day of April, A. D. 1893, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth District.

THE UNITED STATES OF AMERICA, Appellant,
vs.
Mrs. MARTHA INSLEY, Formerly MARTHA PALMER; Mrs. LAURA Guelick, Formerly Laura Palmer; Mrs. Barbury R. Insley, Formerly Barbury R. Palmer, and James M. Palmer, Heirs-at-law of Polly Palmer, Deceased; Mrs. Elizabeth McElroy, Wife and Heir-at-Law of M. McElroy, Deceased, and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, Heirs-at-law of M. McElroy, Deceased, and Mrs. Elizabeth McElroy, as Administratrix of the Estate of M. McElroy, Deceased, and E. Nold, Appellees.

Know all men by these presents that we, Elizabeth McElroy, as principal, and J. R. Coleau and J. H. Mead, her sureties, are held and firmly bound unto the United States of America in the sum of two thousand five hundred dollars, lawful money; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators.

Sealed with our seals and dated this 23d day of March, 1893.

The condition of the above obligation is such that whereas a judgment and decree has been rendered in the above-entitled case in the above-entitled court in favor of the said United States of America; and whereas the said appellees above named, and especially the said Elizabeth McElroy, desire to appeal said case
49 to the Supreme Court of the United States, which appeal has been granted:

Now, if the said appellees above named, and especially the said Elizabeth McElroy, shall prosecute such appeal to effect and answer all damages and costs if they fail to make good their appeal and will not do or suffer any waste to be done or committed upon the property mentioned and described in the bill of complaint herein, then the obligation shall be void; otherwise to remain in full force and effect.

ELIZABETH McELROY.
JAS. R. COLEAU.
JOHN H. MEAD.

UNITED STATES OF AMERICA, }
State of Kansas. }

J. R. Coleau and J. H. Mead, being each duly sworn, upon oath, each for himself, says that he is worth the sum of twenty-five hundred dollars over and above all debts, liabilities, and exemptions.

JAS. R. COLEAU.
JOHN R. MEAD.

Subscribed and sworn to before me this the 24th day of March, A. D. 1893.

[SEAL.] GEO. F. SHARITT,
Clerk U. S. Circuit Court,
By S. P. MOSHER, *Dep. Clerk.*

Acknowledged before and approved by me this 24th day of March, 1893.

S. P. MOSHER,
Dep. Clerk.

Approved:
HENRY C. CALDWELL,
Circuit Judge.

Endorsed: No. 125. The United States, appellant, *vs.* Mrs. Martha Insley *et al.* Supersedeas bond on appeal. Filed Apr. 12, 1893. John D. Jordan, clerk.

And on the fifteenth day of April, A. D. 1893, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

50 The United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit, wherein Mrs. Martha Insley, formerly Martha Palmer; Mrs. Laura Gullick, formerly Laura Palmer; Mrs. Barbary R. Palmer and James Palmer, heirs-at-law of Polly, deceased; Mrs. Elizabeth, wife and heir-at-law of M. McElroy, deceased, and Eliza J. McElroy, Emma G. McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs-at-law of M. McElroy, deceased, and Mrs. Elizabeth McElroy, as administratrix of M. McElroy, deceased, and E. Nold are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the United States circuit court of appeals for the eighth circuit, this 27 day of M'ch, in the year of our Lord one thousand eight hundred and ninety-three.

HENRY C. CALDWELL,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Service of the above citation admitted this April 14, 1893.

E. F. WARE,
Sp. Att'y for U. S., Complainant.

[Endorsed:] No. —. United States circuit court of appeals, eighth circuit. Mrs. Martha Insley *et al.*, appellants, *vs.* The United States of America. Citation on appeal. Filed Apr. 15, 1893. John D. Jordan, clerk.

51 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing fifty pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The United States of America, appellant, *vs.* Mrs. Martha Insley *et al.*, appellees, No. 125, December term, 1892, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original citation in said cause is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this fifteenth day of April, A. D. 1893.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: Case No. 15,298. U. S. circuit court of appeals, 8th circuit. Term No., 921. Mrs. Martha Insley *et al.*, appellants, *vs.* The United States. Filed April 21, 1893.

921

921

Office Supreme Court U. S.
FILED.
NOV 3 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

MARTHA INSLEY AND ELIZABETH McELROY, *et al.*,
Appellants.

vs.

THE UNITED STATES, *Appellees.*

APPEAL FROM THE U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Brief of Appellants.

J. D. McCLEVERTY,
Solicitor for Appellants.

JAMES A. MOULTON, PRINTER, FORT SCOTT, KANSAS.

——IN THE——

Supreme Court of the United States.

MARTHA INSLEY AND ELIZABETH McELROY, *et al.*,
Appellants.

vs.

THE UNITED STATES, *Appellees.*

APPEAL FROM THE U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Brief of Appellants.

J. D. McCLEVERTY,
Solicitor for Appellants.

STATEMENT.

This is a suit in equity, brought by the United States claiming the right to redeem from the title now held by Elizabeth McElroy to Lot 1, Block 104, in Fort Scott, Kansas. The case was here once before—United States vs. Insley, 120 U. S., 263,—and after its return was tried upon an agreed statement of facts—pp. 7 & 19—and a small amount of record evidence. The substantial facts are as follows:

In July or August, 1869, Joseph H. Roe and C. A. Ruther were arrested upon a complaint charging them with violating the internal revenue laws of the United States. On the 3rd of August, 1869, they were placed under bonds for their appearance before the United States District Court for the District of Kansas, with one M. McElroy and one Charles Bull as sureties. The bond or recognizance is in the following language:

"Know All Men by These Presents, That we, Joseph H. Roe, C. A. Ruther and M. McElroy and Charles Bull, are jointly and severally held and firmly bound unto the United States of America in the penal sum of two thousand dollars, lawful money, for the payment of

which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

Witness our hands and seals this third day of August, A. D. 1869.

The conditions of the above obligation are that if the above bounden Joseph H. Roe and C. A. Ruther shall each of them be and appear, in his own proper person, before the United States District Court, in and for the District of Kansas, at the next term thereof, and on the first day of said term, there to answer to a charge of wilfully and knowingly violating the internal revenue laws of the United States, and shall not depart said court without leave, and shall abide the judgment of said court therein, then the above obligation to be void, otherwise to be and remain in full force and effect.

C. A. RUTHER, [SEAL]
J. H. ROE, [SEAL]
M. McELROY, [SEAL]
CHAS. BULL. [SEAL]

Subscribed in my presence and approved this August 3, 1869, at Fort Scott, Kansas.

W. A. SHANNON,
U. S. Com'r."

On the 12th day of October, 1869, that being the second day of the term, a forfeiture of this recognizance was taken and an order for a writ of *scire facias* which was issued, returnable Oct. 30. On the 6th day of Nov., 1869, and at the same term, a motion was made to make the forfeiture final and for judgment, which was entered for the sum of two thousand dollars, the penalty of the bond. No suit was brought upon this bail bond, nor other proceedings had, except as above stated.

Before the rendition of the judgment McElroy, one of the sureties, had bought from one Bryant (the purchase being made Aug. 5, 1869,) lots 1 and 3, in block 104, in Fort Scott, the purchase price being six thousand dollars. At the time of this purchase, and to pay for this property, McElroy borrowed from one Palmer, three thousand five hundred dollars, and gave a mortgage dated August 7th, 1869, upon these lots in Fort Scott to secure the loan.

April 27th, 1871, a *pluries* execution was ordered out on the judgment of Nov. 6th, 1869, in favor of the United States, and on May 2d, 1871, the execution was levied upon these lots, one and three, in block 104, in Fort Scott.

May 30th, 1871, Palmer brought suit to foreclose his mortgage, *but did not make the United States a party defendant.*

Service of summons in the foreclosure case was made on McElroy and wife May 31st, 1871.

June 6th, 1871, at a sale under said *pluries* execution, the United States bought said lot in satisfaction of its debt.

October 4th, 1871, Palmer obtained judgment of foreclosure in the sum of $3,764.16 and costs.

October 16th, 1871, the sale to the United States was confirmed

and deed ordered made. The deed was subsequently made, but not until Oct. 30th, 1883, upon an order then made,—p. 21.

October 25th, 1871, Palmer ordered out execution against McElroy.

December 4th, 1871, the property was sold under the Palmer execution and bid in for the debt by Palmer. The sale was confirmed, and on January 4th, 1872, a sheriff's deed was made to Palmer.

Here occurs an interregnum of over twelve years in the proceeding in said U. S. District Court. This suit was brought November 28, 1884. The United States has never been in possession of said property.

The attitude of the title on January 4th, 1872, was:

First. The property had been sold to the United States by sale confirmed October 16th, 1871, on a second lien.

Second. The property had been sold to Palmer by sale confirmed December 26, 1871, on a first lien, the United States not being a party defendant.

Between January 4th, 1872, and the filing of this bill, on November 28th, 1884, McElroy and wife remained in possession of said lot, with the consent of Palmer, under an agreement of sale to Mrs. McElroy, until the death of Palmer, November 13th, 1872, after which the agreement lapsed. Afterwards the Palmer heirs desired to sell, and they made another agreement with McElroy, who acted as agent for his wife, that they would sell the lots to Mrs. McElroy, defendant herein. Payments on the property began and slowly progressed through a series of years. The property had an earning capacity, and the rents and profits went to Moses McElroy. He died August 24th, 1881, leaving the property partly unpaid for.

In the agreed statement of fact it is admitted that the said agreement with the Palmer heirs vested the title and ownership of said lot: "in the said defendant, Elizabeth McElroy, except as affected by the claim or interest of the complainant in this action, if it shall be determined any such claim or interest exists.

The payments to Polly Palmer and her estate of the purchase price were made by Moses McElroy from his own funds while living, and from the same sources the taxes were paid until the bringing of this action.

After the agreement of purchase had been made by Elizabeth McElroy she improved the lots by erecting certain buildings thereon, at an expense of several thousand dollars, and has ever since paid all taxes and assessments levied upon said property, and has also collected the rents and enjoyed the use and benefit of the property, and the rents and profits so received and enjoyed by the said Elizabeth McElroy since her purchase of said lots exceeds by a small amount the principal and interest that would now be due under the said Mortgage of Aug. 7th, 1869, by way of redemption, and also exceeds in addition thereto the total amount expended by the said Elizabeth McElroy since her said purchase for improvements made and taxes paid upon said property, with interest to date."

The property was finally deeded by the Palmer heirs to Mrs. McElroy about five years after her husband's death, and after the filing of this bill. All of the defendants, except Elizabeth McElroy, have disclaimed any interest in the property in dispute.

ASSIGNMENT OF ERRORS.

1. That there was error in holding the judgmennt in U. S. vs. Ruther, et al., a valid judgment.

2. That there was error in not holding said judgment had become dormant, even if originally valid.

3. That there was error in not declaring the deed to the United States void.

4. That there was error in granting to complainant below the equitable relief prayed for.

5. That there was error in not quieting the title of defendants below as against the claim of the United States.

6. That there was error in reversing the decree of the Circuit Court.

ARGUMENT.

There is very little real equity in this case so far as the United States is concerned. Had this suit been brought promptly after the sale to the government, and this property sold in payment of these liens, it is very plain from this record that there would have been nothing realized for the United States. The appraised value of the two lots sold under the Palmer mortgage was $4,200.00,—p. 11,—and two-thirds of that, the rule in Kansas, would not have paid the Palmer mortgage,—p. 11,—while the government probably would not have competed. By waiting, however, until 1884, and finding an increased value it might realize its claim. Under the former ruling in this case, however, this laches it is held does not effect the government and need not now be discussed.

As one of the principal questions in this case arises upon the force and effect of the statutory provisions authorizing the taking of recognizances in criminal cases, those sections of the Federal and State statutes are here set out. The only provision in the statutes of the United States providing for bail of offenders is found in Sec. 1014 of the United States Revised Statutes, which provides:

"That for any crime or offense against the United States the offender may, by any justice or judge, commissioner, etc., to take bail in any State where he may be found and agreeably to the usual mode of process against offenders in such State."

The statutes of Kansas then in force and still practically the same, providing for the arrest and bail of offenders, which effect this case, are as follows: Code of Criminal Proceedure, Gen. Stat. 1868 and Gen. Stat. 1889.

Sec. 48. "The magistrate before whom any person is brought,

upon a charge of having committed an offense, shall, as soon as may be, examine the complainant and the witnesses to support the prosecution, on oath, in the presence of the party charged."

Sec. 53. "Persons charged with an offense punishable with death, shall not be admitted to bail when the proof is evident or the presumption great, but for all other offenses, bail may be taken, in such sum as, in the opinion of the magistrate, will secure the appearance of the person charged with the offense, at the court where such person is to be tried."

Sec. 54. "If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner guilty, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged."

Sec. 136. "All recognizances required, or authorized to be taken, in any criminal proceeding, or in any proceeding of a similar nature, shall be in writing, and shall be subscribed by the parties to be bound thereby."

Sec. 149. "The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court or to the sheriff, and, upon the payment of all costs, may thereupon be discharged from any further liability upon the recognizance."

Sec. 152. "If without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited."

Sec. 153. "The prosecuting attorney may, at any time *after the adjournment of the court, proceed by action against the bail upon the recognizance.* Said action shall be governed by the rules of civil pleading, as far as applicable."

Sec. 154. "No action upon a recognizance shall be defeated, nor shall judgment thereon be arrested, on account of any defect of form, omission of recital, condition of undertaking therein, neglect of the clerk or magistrate to note or record the default of any principal or surety at the term or time when such default shall happen, or of any other irregularity, so that it be made to appear that the defendant was legally in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance, that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense."

Also the following sections from the Code of Civil Proceedure of the State of Kansas. Gen. Stat. of 1868 and Gen. Stat. of 1889:

Sec. 6. "Actions are one of two kinds: First, civil. Second, criminal."

Sec. 7. "A criminal action is one prosecuted by the State as a

party, against a person charged with a public offense, for the punishment thereof."

Sec. 8. "Every other is a civil action."

Sec. 57. "A civil action may be commenced in a court of record, by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

The United States District Court for Kansas, on April 10th, 1861, formally adopted the Kansas Code of practice by order as follows—p. 47:

"Wednesday, April 10, 1861.

It is ordered by the court that the following rules and regulations be and they are hereby adopted in this court."

* * * * * * * * * *

RULE 2.

"The practice and pleadings of this court shall conform as far as may be to the law regulating the practice and pleading of the different courts in this State, except in equity and admiralty cases."

It will be noticed that the judgment upon which this suit for the government is based was rendered upon a *scire facias*, and the questions raised by the defendants in the lower courts and now here as appellants, are:

1. That there never was any valid judgment, the proceedings by *scire facias* being illegal and void.

2. That even if the judgment was valid, it is no longer a lien because the defendant McElroy died Aug. 24th, 1881, and the judgment never having been revived was dormant when this suit was begun.

1. Is the judgment valid?

That on Nov. 6th, 1869, the U. S. District Court for the District of Kansas did, at least in form, render a judgment for $2,000.00, the penalty of the recognizance above mentioned, and that it is still unpaid is admitted. That such judgment was valid if that court had acquired jurisdiction to render it, may also be admitted. But it is respectfully urged that that court had no jurisdiction because no suit had been brought upon said recognizance as required by law, and no action was then pending thereon.

Whether it was necessary to enforce a recognizance by action must of course depend upon the statutory provisions regulating the taking of bail in criminal cases and the enforcement thereof, and for convenience those provisions have been set out above. The provisions of Sec. 1014 of the United States Statutes, declaring that the arrest and bail of offenders shall be "agreeably to the usual mode of process against offenders in such state" where taken, was considered and construed at a very early day in United States vs. Rundlett, 2 Curt. 41, and held to mean, as adopting the state practice and proceedure as to bail, and that such bail was just what the state law in each instance declared. This has been followed ever since.

In United States vs. Horton, 2 Dill. 94, it is held that unless the

recognizance was valid under the state law the sureties were not liable, and that where the state practice, that of Missouri, was not followed, which declared that in a preliminary hearing no continuance could be taken for more than ten days, a recognizance taken for a continuance for a greater period by a U. S. commissioner was void, and this on the authority of United States vs. Rundlett.

In United States vs. Evans, 2 Fed. Rep. 147, the point was urged that the recognizance was invalid because it was taken by the clerk only and not by the court, but it was held that "the Federal courts are bound in the matter of taking bail in criminal cases by the State laws, by express command of the statutes,—Rev. Stat., §§ 1014–1015," and that as the statutes of Tennessee, where the bond was taken, declared that every bond that would be good as a common law bond should be held to be a good statutory bond, the defence was not good.

If the State law governs, then it is plain that as a recognizance can by that law only be enforced by action which could not be brought until after the adjournment of the term at which forfeiture is taken, that the proceeding by *scire facias*, as was done in this case, was unauthorized and void. Sec. 153, above set forth, expressly declares that a recognizance shall only be enforced *by action*, since "may," in that section, undoubtedly means must.

Beyond question the legislature had power to abolish the proceedure by *scire facias* and to provide that *an action* should be brought, and Sec. 57 of the Code of Civil Proceedure, before quoted, provides that "a civil action may (must) be commenced in a court of record, by filing in the office of the clerk of the proper court *a petition and causing a summons to be issued thereon.*" In this instance no action was brought, no petition was filed, no summons was issued, and this too in the face of the rule that the Kansas practice and proceedure had been adopted by the District Court. When the common law practice was abolished in Kansas a substitute became necessary, and hence in place of a recognizance of record which had been abolished, it was provided in Sec. 136, before quoted, that "all recognizances required, or authorized to be taken in any criminal proceeding, or in any proceeding of a similar nature, *shall be in writing, and shall be subscribed by the parties to be bound thereby.*" This change made a recognizance a mere contract, and being such, could only be enforced by action, as in the case of any other contract.

In State of Kansas vs. Weatherwax, 12 Kan. 463, in defining a recognizance under the Kansas statute, it is declared that "at common law a recognizance was defined as 'an *obligation of record founded upon an acknowledgment of an existing indebtedness by the person bound,*' and was something more than a contract. But under our law a *recognizance may not inaptly be held and treated as a contract.*" Being at common law "*an obligation of record,*" there was no need of bringing a suit thereon in order to create a record upon which a judgment might be rendered, and *scire facias* was sufficient, but just as logically, when it ceased to be "an obligation of record" and became a mere coutract, then an action thereon became necessary in order to create a record, even aside from the express declaration of Sec. 153, requiring that it be enforced by action.

Mr. Justice Brewer, then of the Supreme Court of Kansas, in

Morehead vs. the State, 20 Kan. 636, holds, at least impliedly, not only that an action must be brought, but that under Sec. 153 it cannot be brought until after the adjournment of the term at which forfeiture was taken in a case where suit had been begun at the same term. On p. 637 he says:

"Granting authority to do an act after a given time, impliedly prohibits the doing of the act before that time. *Expressio unius, exclusio alterius.* No force is given to the words 'after the adjournment of the court,' if he may bring action before the adjournment. And effect must be given if possible to all the terms of the legislative direction. Affirmative words, directing the doing of an act by a public officer at a given time, are often considered merely directory, and the act sustained, though done at a later date. But this is where the matter of time is really immaterial, and no one's rights can be prejudiced by the delay. But where authority is given to do a certain act after the happening of some event, and the doing of the act prior to the event would operate to deprive the party of any rights, such party may insist that the act is prematurely done. Now Sec. 149 of the same chapter provides that 'the bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court, or to the sheriff, and upon payment of all costs may thereupon be discharged from any further liability upon the recognizance.' The commencement of a suit creates costs. The earlier a suit is commenced the sooner it passes into judgment. And if, as in the case at bar, the amount be within the jurisdiction of a justice of the peace, and suit brought in that court, it may pass into judgment in three days. *Thus it might happen that at the same term, and within a few days after forfeiture, and before the bail had time to pursue, arrest and surrender his principal, final judgment might be rendered against him.* The statute evidently contemplated that the bail should have some reasonable time in which to obtain and surrender his defaulting principal, before he is exposed to the costs of a suit, or deprived by judgment of a right to escape liability. This right he was deprived of in this case by the premature commencement of the action on the recognizance."

This decision by one of the justices of this court would seem to cover the case at bar and require a reversal of the decree of the Court of Appeals, covering as it does practically every phase here involved. There was not only a failure to bring suit at all, but judgment was taken within a few days and at the same term of the forfeiture, thus depriving the surety "of a right to escape liability." Section 154, with reference to actions of this kind, also indicates plainly that the legislature meant to require actions to be brought, while the form and language of the recognizance in question show, also, that the sureties understood that they were making a Kansas contract, and would be entitled to the full benefits of the Kansas law. In the court below it was argued that since the Circuit and District Courts for the District of Kansas had enforced recognizances in some instances by *scire facias*, that it should now be held the proper practice, is of but little force in the face of the Morehead case, since in the cases cited below the question was not raised.

It is also noticeable that *scire facias* does not exist in Kansas, while in the neighboring state of Missouri recognizances may by statute be enforced by *scire facias*, as was formerly true in Iowa, but the

claim is here made that without a statute, and in fact in the face of one, *scire facias* may be used in Kansas.

Prior to 1872 it was at least usual for the Federal courts to adopt the State practice by rule of court, as was done in this instance, and some of those courts also provided as in New York, that recognizances might be enforced by *scire facias*, as was properly done prior to 1872, but in the absence of such a rule the State practice would govern.

Gwinn vs. Breedlove, 2 How. 29, p. 36.
Gwinn vs. Barton, 6 How. 7.

Had these sureties required and had inserted in this recognizance a provision—that it could only be enforced by action, and then not until after the adjournment of the term at which forfeiture should be taken, and that in the meantime they could deliver up their principal, pay the accrued costs and be discharged,—it could scarcely be claimed that their liability could be extended against their will, since sureties may stand upon the letter of their contract; nor can it reasonably be claimed that such was not in fact this contract, and if so then a regular action was necessary.

2. But is this still a subsisting judgment lien, even if originally valid?

Where a creditor seeks to appropriate and have subjected to the payment of his lien property of his debtor which has been transferred to a third party in violation of his lien rights, he may proceed in one of two ways. If a judgment lien, he may levy upon the property he seeks to reach and then bring suit to determine the rights of all claimants and to subject that property to his judgment; or he may levy upon and sell the property, obtain a deed and then bring ejectment. If he does pursue his legal remedy to actual sale and a deed, it is possible he may waive his rights under his deed and proceed by suit in equity, as is being done in this case, but if he does his right to maintain such a suit does not rest upon his legal title by deed, but rests upon the fact of having a subsisting judgment lien. If this is correct, then what is the condition of this judgment, even if originally valid? The complainant's bill alleges, as is shown by the agreed facts, that M. McElroy, the judgment debtor, died in August, 1881, and there is no pretense that the judgment has ever been revived, and it is held in Teft vs. Citizens Bank, 36 Kan. 457, and Mawhinney vs. Doane, 40 Kan. 676, that six years is the longest period within which a revivor may be had. As this is a rule of practice under the Kansas Code, and not a mere statute of limitations, it would follow that this judgment, if the thing relied upon, is now dormant. In Ransom vs. Williams, 21 Wall. 313, a judgment had been rendered in Illinois, an execution issued and a sale made, which had been set aside. After that the judgment debtor died. After that another execution was issued, without reviving the action and a sale made, under which the plaintiff claimed. Of this the court says, p. 317: "By the common law the death of either party arrested all further proceedings in the case. * * * When a defendant dies after judgment, and an execution is subsequently issued without the notice required by the statute having been given, or the judgment revived, the execution is a nullity, and all proceedings under it are void."

In this instance, while an execution was not issued nor a sale

made, yet a deed was wanted and was obtained, and in obtaining it the law was not complied with, but proceedings in court were necessary. Section 465 of the Kansas Code of Proceedure provides that where the sheriff's term of office expires after a sale of land by him without a deed having been made, an application shall be made to the court for his successor to make a deed, and such successor, "on receiving a certificate from the court from which the execution issued for the sale of said lands and tenements, signed by the clerk, by order of said court, setting forth that sufficient proof had been made to the court that such sale was fairly and legally made," may execute a proper deed to the purchaser. This provision was not complied with,—p. 23,—but a deed simply executed in 1883 by the marshal, and this too after the enactment of the statute of 1872, which beyond question adopted the state practice. It would seem that if the state practice requiring the appraisement of real estate applied to Federal courts, so, also, would this provision with reference to making deeds by the marshal. If it does, then it follows that the deed to the government is void and cannot be relied upon to strengthen the lien of its judgment, even if the judgment was valid when rendered.

In the lower courts it was claimed that the defendant, Moses McElroy, had appeared to the *scire facias*, and thus given jurisdiction to the District Court. The appearance, however, was merely special,—p. 28,—and not a general appearance, but even a general appearance to an illegal proceeding would not give it validity.

In conclusion it might be stated that no claim is made that a judgment may be collaterally attacked, but the claim is made that this judgment so-called is void, and to summarize the argument it is:

1. That the alleged judgment is void because no action was brought upon the recognizance as required by law.

2. That if the judgment was valid, and that is now relied upon, it has become dormant because of the death of the defendant.

3. That if the deed is relied upon it could not be the basis of an equitable action, and in any event is void because not issued in conformity to law.

If either of these be correct the decree below must be reversed.

It has been suggested to me by the counsel for appellee that some question of practice will be raised, but not having the benefit of opponent's brief I can not surmise what it may be, unless that this is a case "under the revenue laws," and hence not appealable. It is urged, however, that no question under the revenue laws arises in this case, but primarily, and in fact, under a general statute,—Sec. 1014 of the United States, and is a question of general law, and in no wise involving the construction or effect of the revenue laws. If the judgment upon the recognizance was originally valid, all revenue questions terminated there, and this is purely and simply a suit to redeem, arising under the general rules of equity; while if that judgment is void there is again only a question of general law involved, and the last clause of section six of the Court of Appeals act would seem to govern.

J. D. McCLEVERTY,

Solicitor for Appellants.

Fort Scott, Kan., Oct. 30, 1893.

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JAMES H. McKENNEY,
CLERK

15,298.

UNITED STATES SUPREME COURT.

MRS. MARTHA INSLEY, ET AL., *Appellants*,
vs.
THE UNITED STATES.

No. 921.—OCTOBER TERM, 1893.

BRIEF OF APPELLEE.

E. F. WARE,
Special Assistant.

HON. LAWRENCE MAXWELL, JR.,
Solicitor General of the United States,
Of Counsel.

CRANE & CO., TOPEKA.

UNITED STATES SUPREME COURT.

MRS. MARTHA INSLEY, ET AL., *Appellants*,
vs.
THE UNITED STATES.
No. 921.

BRIEF OF THE UNITED STATES.

HISTORY OF THE CASE.

THIS action was begun in the United States Circuit Court, District of Kansas, by the United States Nov. 28, 1884, and upon the demurrer of the defendants, Insley *et al.*, was decided against the United States Dec. 14, 1885; but the decision was reversed in the United States Supreme Court, (130 U. S. 263,) and the case was sent back.

The parties then prepared an agreed statement of facts and filed the same in the case, and the Circuit Court, upon consideration again Feb. 29, 1892, decided for Insley *et al.*

The case was then taken by the United States to the Circuit Court of Appeals, Eighth Circuit, where it was decided, Feb. 6, 1893, in favor of the United States. (24 Fed. Rep. 221.)

The case is brought here by Insley *et al.* to reverse the ruling of the Court of Appeals.

STATEMENT.

The action is an equitable one, concerning lot 1, block 104, city of Fort Scott, Kansas.

The real defendant is Mrs. McElroy. She and the United States claim title adversely through two different and distinct judicial sales, which sales were in separate suits, *in each of which the other was not a party*, so that each party has a right to redeem.

Each party has a deed, and the United States brings suit to be permitted to redeem, or to compel the defendants to redeem.

There is no question of homestead involved, and since the said Supreme Court decision there is no question of laches or limitation.

When the United States brought this suit to redeem, or to compel the defendants to redeem, the defendants pleaded that the United States had no standing in court, for that the rights of the United States came through a certain judgment, and that (first), said judgment was void and was not a judgment; and (second), that if the judgment was not void, then it was dormant.

The Circuit Court decided in favor of the defendants, but, the United States appealing, assigned errors, which errors, succinctly stated, were as follows:

1st. The court erred in holding void the judgment rendered in favor of the United States, and the Marshal's deed issued thereon conveying the property in question to the United States.

2d. The court erred in permitting the said judgment to be impeached collaterally.

3d. The court erred in holding that, if the said judgment was not void, that it was now dormant and must be revived.

4th. The court erred in quieting the title of the defendants.

The Court of Appeals reversed the Circuit Court upon the points raised.

BRIEF.

I.

The United States claims under its deed, and has the right to possession unless Mrs. McElroy redeems from the United States, which she must do now or forfeit all her right.

EPITOME OF FACTS.

Upon an obligation dated Aug. 3, 1869, the United States recovered in the District Court of the United States a judgment against Moses McElroy, on Oct. 16, 1869, in the sum of $2,000, bearing interest from date of rendition. (17, 18.)

Before the rendition of said judgment, said McElroy had bought from Bryant, Aug. 5, 1869, for $6,000, lots 1 and 3, block 104, city of Fort Scott. But in order to pay for them, he at the time of purchase, borrowed money and mortgaged said lots for $3,500 to Palmer, said mortgage being dated Aug. 7, 1869. (10.)

Upon April 27, 1871, a pluries execution was ordered out on said judgment in favor of the United States; and on May 2, 1871, the said lots were levied upon. (12.)

Upon May 30, 1871, Palmer brought suit to foreclose his mortgage, *but never made the United States a party defendant.* Service of summons was made on McElroy and wife May 31, 1891. (10.)

Upon June 6, 1871, at a sale under said pluries execution, the United States bought said lot in satisfaction of its debt. (12.)

On October 4, 1871, Palmer obtained judgment of foreclosure in the sum of $3,764.16 and costs. (11.)

On October 16, 1871, the sale to the United States was duly confirmed and deed ordered. The deed was subsequently made. (13.)

On October 25, 1871, Palmer ordered out execution against McElroy. (11.)

On December 4, 1871, the property was sold under the Palmer execution, and bid in for the debt by Palmer. The sale was confirmed, and on Jan. 4, 1872, a sheriff's deed was made to Palmer.

Here occurs an interregnum of over twelve years. This suit was brought November 28, 1884. The United States has never been in possession of said property.

THE ATTITUDE OF THE TITLE,

On January 4, 1872, was:

First. The property had been sold to the United States by sale confirmed October 16, 1871, on a second lien.

Second. The property had been sold to Palmer by sale confirmed December 26, 1871, on a first lien, the United States not being a party defendant.

Third. The United States, not having been made a party, had a right to redeem, and treat the Palmer sheriff's deed as a mortgage in the hands of Palmer, and Palmer as a mortgagee in possession.

DURING THE INTERREGNUM

Between January 4, 1872, and November 28, 1884—date of this suit—the following circumstances took place:

The said McElroy and wife remained in possession of said lot, with the consent of said Palmer, under an agreement to purchase, until the death of said Palmer—Nov. 13, 1872—after which the agreement lapsed. Afterwards the Palmer heirs desired to sell, and they made another agreement with McElroy, who acted as agent for his wife, that they would sell the lot to Mrs. McElroy, defendant herein. Payments on the property began, and slowly progressed through a series of years. The property *had an earning capacity*, and the rents and profits went to Moses McElroy. He died August 24, 1881, leaving the property partly unpaid for.

In the agreed statement of facts it is admitted that the said agreement with the Palmer heirs vested the title and ownership of said lot:

"In the said defendant, Elizabeth McElroy, except as affected by the claim of interest of the complainant in this action, if it shall be determined any such claim of interest exists." (8.)

"The payments to Polly Palmer and her estate of the purchase-price were made by Moses McElroy from his own funds while living, and after his death the balance thereof also was paid from his estate, and from the same sources the taxes were paid until the bringing of this action." (8.)

"After the said agreement of purchase had been made by the said Elizabeth McElroy, she improved the said lots by erecting certain buildings thereon, at an expenditure of several thousand dollars, and has ever since paid all taxes and assessments levied upon said property, and has also collected the rents and enjoyed the use and benefit of said property, and the rents and profits so received and enjoyed by the said Elizabeth McElroy since her purchase of said lots, exceed by a small amount the principal and interest that would now be due under the said mortgage of August 7th, 1869, by way of redemption, and also exceed in addition thereto the total amount expended by the said Elizabeth McElroy since her said purchase, for improvements made and taxes paid upon said property, with interest to this date." (8.)

The property was finally deeded by the Palmer heirs to Mrs. McElroy, about five years after her husband's death, and *after the filing of the bill in this action.*

THE CONTENTION OF THE UNITED STATES

Is that Mrs. McElroy, by purchasing from the Palmer heirs, became only a mortgagee in possession. She held a first lien through Palmer, and had a right, if she demanded, to pay the claim of the United States, which now, costs, interest and all, amounts to over $5,000.

As heirs of Moses McElroy, the defendants have no rights, be-

cause as to them the property has been sold and deeded to the United States.

On the other hand, Moses McElroy and his estate have paid off the first lien of the Palmer mortgage, and Mrs. McElroy now holds the title simply in trust for herself and children. As she was administratrix and furnished the payments from the estate of her husband, she would not be permitted to dispute the trust, and in all probability never has disputed and never intends to dispute the trust.

It is a rule of property in Kansas, that as to the owner, the mortgagee in possession is responsible for the rents and profits, and must account for them, and if they exceed the mortgage, ordinary repairs and taxes, then the mortgagee is paid. *Nothing is allowed for permanent improvements.* (*Cook v. Ottawa*, 14 Kas. 548.)

At the time of the filing of the complainant's bill herein the McElroy heirs were simply mortgagees in possession, as against the United States, and Mrs. McElroy held the mortgage, in trust, in her own name as grantee for them.

At the time of the filing of this bill, each party had the right to redeem.

As between several persons entitled to redeem, redemption will be decreed according to the priority of the claimants. Hence, at the time of the filing of this bill, each party had the right to redeem, but Mrs. McElroy had the prior right. Equity, under the circumstances, would give her the right on behalf of the heirs and the apparent hardship of a different view of the case. But, upon the strict, cold law of the case, the United States owns the property absolutely, under its deed, and as against the heirs of McElroy claims absolutely under its deed.

II.

The United States District Court had jurisdiction both of the subject-matter and of the person, and the judgment which was rendered was valid and could not be impeached collaterally.

A copy of the judgment is seen in the printed record. The following is a portion thereof:

"It is therefore considered and adjudged by the court, . . . that the said plaintiff have and recover of and from the said defendants, M. McElroy and Charles Bull, the sum of ($2,000) two thousand dollars, the amount in the recognizance herein specified, as also its costs in this behalf expended, and that for said amount and costs execution issue." (18.)

A.

Did the court have jurisdiction of the subject-matter?

"The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states." (Rev. Stat. U. S., § 711.)

"The DISTRICT COURTS shall have jurisdiction as follows:

"1. Of all crimes and offenses, cognizable under the authority of the United States, committed within their respective districts.

"3. Of all suits for penalties and *forfeitures* incurred under any law of the United States.

"4. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." (Rev. Stat. U. S., § 563.)

"SEC. 716. The Supreme Court, and the Circuit and *District courts* shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the authority and principles of law." (Rev. Stat. U. S.)

"SEC. 918. The several Circuit and District courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments, by default, and

other matters in vacation, and *otherwise regulate their own practice* as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. (Rev. Stat. U. S.)

From the above it will be seen that the United States District courts have jurisdiction of all suits for forfeitures and penalties; and also that they have power to issue writs of *scire facias*.

"The District Court has jurisdiction of all proceedings consequent upon the judgment to obtain satisfaction. Where a bond for jail liberties is taken and duly returned and enrolled, the court has jurisdiction of a petition in the nature of a *scire facias* upon such bond."

Campbell vs. Hoadley, 1 Sprague, 470. (1859.)

In Thatcher's Practice (1883) are given the rules of the District Court of the United States for the Southern District of New York. They were adopted in November, 1838, and are still rules. Rule No. 225 is found on page 370, and is as follows:

"When default is made by any party or witness, bound by recognizance in any criminal proceeding, the clerk shall immediately issue a *scire facias* thereon."

In Conklin's Treatise, fifth edition, page 850, the same rule is quoted, as being the rule of the other districts of New York. Made January, 1853.

These rules prevail in the United States District Court, *where the code has long been* the rule of practice in the State courts.

B.

Judgment was rendered in this case by proceedings in *scire facias* upon a recognizance. The recognizance was first forfeited and forfeiture entered of record. Then proceedings in *scire facias* were had, the defendant appeared, and judgment was entered.

What is a recognizance? The Supreme Court of Kansas says:

"A recognizance is defined by Blackstone to be 'an obligation of record which a man enters into, before some court or magistrate duly authorized, with condition to do some particular act; as, to appear at

the assizes, to keep the peace, or the like.' It does not, like a bond, create a new debt, but is the acknowledgment of a precedent one: 2 Bl. Com. 341; when carried into the record it becomes a part of it: 4 Bl. Com. 253. At common law, recognizances were taken by the court or magistrate taking the same stating to the bail the obligation entered into and its conditions, to which they assent. A minute is made of this act at the time, from which a formal record is prepared, which is filed in the court where the party is bound to appear, and thus becomes a part of the record. In this State all recognizances must be signed by the parties to be bound thereby: Crim. Code, § 136; but while the manner of taking them is changed, the characteristics remain the same. They are still records; and so is the warrant on which the party was arrested who is admitted to bail, and the certificate of the fact of the prisoner's being admitted to bail: Crim. Code, § 41. So that the same act that makes the recognizance part of the records of the court, makes also the proceedings on which it is based a part of the record."

"We may observe that most of the cases cited by plaintiff in error to show that the liability of sureties is limited to the exact letter of the bond, and if the words of the bond will not make them liable, nothing can, are based upon the reason that the defendants in those cases are sought to be charged for the default of others; . . . . and as *sureties* they must be brought strictly within the terms of the obligation before they can be charged. But this statute of frauds has never been held to apply to *recognizances*, for until a few years they were not signed at all; and the bail are not sureties for a debt or tort of another. As we have seen, they acknowledge a pre-existing debt which they owe to the State; not as surety for the accused, but for themselves. *Bail* is 'a delivery or bailment of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance, he being supposed to continue in their friendly custody, instead of going to jail.' (4 Bl. Com. 297; 2 Hale's Pl. Cr. 15, §§ 2, 3.) A similar idea as to the alleged criminal being in the custody of his bail is found in our statutes, for they may arrest and surrender him without a warrant: Crim. Code, § 148. Therefore, a recognizance is not a contract between individuals to which the statute of frauds will apply; *neither is it a contract of any kind.* It is an acknowledgment of record of a debt that may be discharged by

the performance of the condition thereunder written, or it still remains a debt. If the recognizance is obscure, it may be examined by other parts of the record. (See *Com. v. McNeill, supra.*)"

Gay v. State, 7 Kas. 394.

"A recognizance, however, is more than a contract. It is an obligation of record founded upon an acknowledgment of an existing indebtedness by the person to be bound."

State v. Weatherwax, 12 Kas. 463.

"A recognizance is an obligation of record entered into before a magistrate, duly authorized for that purpose, with condition to appear at the sessions or assizes. The party need not sign this recognizance, but the record therefor is afterwards made out on parchment and subscribed by the justice before whom it is taken. But it is a matter of record as soon as taken and acknowledged, although not made up by the justice and only entered in his book."

Chitty Crim. Law, vol. I, p. 90.

This view of Judge CHITTY has been adopted by the Supreme Court of Kansas, in *Morrow v. State*, 5 Kas. 566.

Again, in *Morrow v. State*, 6 Kas. 222, the Supreme Court says:

"Where money is deposited in lieu of bail and the defendant fails to appear, it is only necessary, in order to declare a forfeiture, that the court shall direct the fact of the deposit and the defendant's neglect to appear to be entered of record. The forfeiture then follows as a matter of course, and the court has only to direct the clerk to pay the money over to the county treasurer."

C.

What is a *scire facias?*

"*Scire facias* is a writ founded upon some record. It is, in all cases, considered in law as an action, because the defendant may plead to it. (Co. Litt., 279*b*; Chit. Gen. Prac. 1140; Tidd Pr. 1090; Foster Sci. Fa. 13; 2 Wms. Saund. 22, 71.) But, in some cases it is an original writ, while in others it is rather a writ of execution."

"On recognizance. A *scire facias* is a judicial writ, but in the nature of an original proceeding, when it is issued by the conusee of a recognizance to have execution against the conusor for the debt.

(Fost. 229, 279, 327; Chit. 888, 1096; 2 Wms. Saund., notes to Underhill & Deveraux.) The *scire facias* is in lieu of an ordinary action."

Rap. & L. Law Dic.

"Judicial records are of two kinds: judgments in former suits, and *recognizances which are in the nature of judgments*. . . . In both of these classes of cases the purpose of the writ is merely to continue a former suit to execution. When the writ is founded on a recognizance its purpose is, *as in cases of judgment*, to have execution. And though it is not a continuation of a former suit, as in the case of judgments, yet not being the commencement and foundation of an action it is not an original, but a judicial writ, and at most is only in the nature of an original action. . . . The pleadings in *scire facias* are peculiar. The writ recites the judgment or other record, and also the suggestions which the plaintiff must make to the court to entitle him to the proceeding by *scire facias*. The writ therefore presents the plaintiff's whole case, *and constitutes the declaration* to which the defendant must plead."

Bouvier Law Dic., "*Scire Facias.*"

The defendant may demur.

Walden v. Craig, 14 Pet. U. S. 147.

For a long and interesting history of the writ of *scire facias* and its application to federal procedure, consult 12 Fed. Rep. 287, in *Grantland v. Memphis.*

Judge HAMMOND gives the common-law learning upon that subject considerable attention in said case.

Another case in which the writ of *scire facias* was used, and in which an opinion was rendered by the same judge upon the same subject, may be found in *United States v. Stevens*, 16 Fed. Rep. 101.

"The remedy upon a recognizance is by means of a *scire facias* against the bail. (1 Harr. & G. [Md.] 154; 1 Ala. 34; 4 id. 331; 16 id. 156; 7 T. B. Monr. [Ky.] 130; 7 J. J. Marsh. [Ky.] 506; 6 id. 91; 4 Bibb. [Ky.] 181; 7 Lehigh. [Va.] 371; 4 Iowa, 289; 3 Blackf. [Ind.] 344; 6 Halst. [N. J.] 124; 19 Pick. [Mass.] 127; 2 Harr. [N. J.] 446.)"

Bouvier Law Dic., "*Recognizance.*"

D.

As to which is preferable, whether a regular suit upon a complaint filed or a writ of *scire facias*, as in this case, we say: Both methods can be used, either the remedy by action or by *scire facias*. It is at the election of the United States as to which form will be used. In 1 Dillon, in the same court and at the same time, were pending two suits, each by the United States against sureties upon bail bonds. In one case, *United States v. Van Fossen*, 406, the proceeding was by *action;* in the other, *United States v. Goldstein*, 413, it was a proceeding by *scire facias*. Both proceedings were instituted by Hon. A. H. Horton, District Attorney, and the procedure was so well settled at the time that no question was raised upon that subject; and these two cases are reported in the book side by side.

It is hardly to be presumed that the Federal judges and officers of the court of that day did not know the nature of the procedure applicable to their courts. It is hardly to be believed that Judge Miller, Judge Dillon and Hon. A. H. Horton were so entirely ignorant of the procedure of courts as not to know how to proceed in a matter of forfeited recognizance, when in those days the procedures were not single and alone, but were in hundreds constantly.

As criminals who violate the laws of the United States may in the first instance be arrested and brought before *State officers*—for instance, the mayors of cities—to be bound over, it is provided that these preliminary proceedings of the arrest and bailing may be in conformity with the laws of the State. But that procedure goes no further than the preliminary. It does not give the person going upon the bond any rights not accorded by the procedure of the United States. There is not grafted into the recognizance any right or privilege by which the procedure upon the bond shall be in pursuance of the State statute. It simply goes to the preliminaries of

the bond, and when the bond has once been given it has become a matter of record in the United States courts, and is, from that time, governed by the procedure of the United States.

Every State has its criminal procedure, and the United States has its criminal procedure. And the laws of the State do not govern the United States courts in the procedure of the latter. If it were possible for the State Legislature to regulate the procedure in the United States courts, there might not be any in the United States courts.

In *United States v. Horton*, (2 Dillon, p. 94,) cited below, the only question involved was *the validity of the recognizance*, and that question was fought out in the courts, and the recognizance declared void. There was no question involved of procedure, of jurisdiction, or collateral impeachment.

And so it was in *United States v. Evans*, 2 Fed. Rep. 147, cited by defendant below.

The procedure by *scire facias* in the original case was one used and adopted by the Federal courts in Kansas, and it was kept up long years after the rule 2 (19), upon which counsel relies. The court that had power to make the rule had power to unmake it. No question as to proceedings in *scire facias* has ever been raised, nor can be found in the books of the State or of the Federal circuit.

Hence we say that the court not only had an original jurisdiction in the case, but that the court did in fact proceed in due and proper form.

E.

Did the court have jurisdiction of the person?

The defendant appeared in the *scire facias* proceedings by an attorney, one of the best known in the State — Hon. W. C. Webb.

Judgment having been rendered against the defendant, his attor-

neys, two in number, took the case to the U. S. Circuit Court by petition in error, but afterwards dismissed the same; and in the journal entry the court, in dismissing the case, say (18): "And it is further ordered by the court, that the judgment heretofore rendered in favor of the said United States against said plaintiff in error in the District Court of the United States for the District of Kansas, at the October term, 1869, be enforced as though no proceedings had been had in this court, and that a copy of this order be certified to the Clerk."

The judgment of the U. S. Circuit Court on petition in error, if anything was needed to complete the judgment below, ended finally and forever all controversy as to the judgment between the United States and M. McElroy. (*Roach v. Privett*, 7 So. Rep. 808 [S. C.]; 90 Ala. 391.)

Hence we say: The U. S. District Court not only had jurisdiction of the subject-matter, but also personal jurisdiction of M. McElroy, and it also used the right procedure, as is shown by the concurrent action of the District and Circuit courts.

III.

Judgments cannot be Impeached as to any Errors Pertaining to Procedure.

Considerable of the foregoing brief is devoted to considering the procedure, because the United States claims that the procedure itself was all correct. As no fraud is alleged, there can be no question now raised except that of jurisdiction, and concerning jurisdiction there is no question in this case. The judgment being unimpeachable, all legal proceedings based upon it are also unimpeachable—such as levy, sale, confirmation, and deed.

When the deed is issued it relates back to the beginning.

30 Kansas, 401.

And it cannot be impeached collaterally.

5 Kansas, 525.
6 Kansas, 311.
Cross v. Knox, 32 Kas. 725.
Rounsville v. Haven, 33 id. 71.
Stetson v. Freeman, 35 id. 523.

In the U. S. Circuit Court, there being an attempt to collaterally impeach a sheriff's deed, in a recent case, the court refused to permit it, and said:

"He did not avail himself of the right of redemption given to him by law, or the grace extended to him by the court, and by the sale of the property and lapse of time all his rights to and interest in the property were extinguished, and the right of the purchaser to have a valid deed from the sheriff became absolute.

"Whether such a deed has or has not been executed and delivered, is a question which is not material in this case, because it does not concern the complainant. He is in no position to litigate with the defendants any question as to the validity or sufficiency of the instrument which their grantor accepted from the sheriff as a deed in compliance with the order of the court."

Stevens v. Ferry, 48 Fed. Rep. 7.

The sale having been duly confirmed, the defendant has lost no rights by the issuance of the deed after the confirmation.

The Circuit Court in its reasoning seems to intimate that the judgment was rendered against McElroy too soon; that McElroy had time within which to return the prisoner to the U. S. Marshal.

If McElroy had ever produced the body of the prisoner, or offered to, there might be some reason for sympathy; but nothing of that kind was done.

The mere fact that a judgment is rendered on an obligation before due, is no reason for collaterally impeaching the judgment.

Robertson v. Huffman, 92 Ind. 247.

IV.

A Judgment in Favor of the United States does not become Dormant.

In this case the judgment was in full force during the lifetime of McElroy, and during his lifetime the property was levied upon, was sold, and the sale was confirmed.

The sale was confirmed and deed ordered Oct. 16, 1871. The death of McElroy took place Aug. 24, 1881 — ten years afterwards.

After the United States, upon execution, had sold the property, had bid it in, and the sale was confirmed and the deed ordered made, the defendant received credit for the amount of the sale, which amount, $2,467, canceled the judgment and left it fully satisfied, and it never had an opportunity to become dormant. *It was satisfied*, hence upon this point the Circuit Court erred. There was no judgment to revive. There was no judgment to become dormant. As between the United States and McElroy, the old criminal recognizance matter was finally and forever settled and ended.

After the sale and confirmation and the satisfaction of the judgment, the defendant McElroy had no further legal interest in the affair. The United States was the *purchaser* of the property. The United States had changed its relation to affairs. It was no longer a plaintiff, it was now a *purchaser*. As a plaintiff its rights had ceased; as an outsider — *as a purchaser* — its new rights had begun. The purchaser owned the land, and against that purchaser the statutes of limitation did not run. It made no legal difference to the

purchaser whether the plaintiffs or defendants in the old suit died or not. The sale had been confirmed, and all of the defendant's and plaintiff's rights were merged in the sale and confirmation. The deed of itself would give the purchaser no title; the deed if issued would be simply evidence of title, and as such was only *prima facie* evidence; the sale and confirmation were the proceedings that really conveyed the title. The court was bound to give a deed when called for, but it was not necessary to consult either plaintiff or defendant. In this case an application was made to the court, and the court *ordered the deed to be made.*

The defendant was alive and represented by able counsel until after sale and confirmation.

The proposition contended for by defendant, that notice of the issuance of the deed should be given to the defendant, or his legal representatives, has no warrant in the State of Kansas, nor in any other State. Hence no decision was cited by defendant to sustain the proposition.

Before the issuance of an execution the death of a party might make a revivor necessary. But after a sale and confirmation no court would hold that the death of a party made a revivor necessary as against the purchaser. After sale and confirmation, the making of a deed is simply a question between purchaser and court. The current of law is, that after the issuance of a writ of execution the death of the defendant does not abate the writ.

Herman on Execution, § 213.
Freeman on Execution, § 37.

In addition to this, judgments do not become dormant as against the United States.

United States v. Houston, 48 Fed. Rep. 207.

So, even if the deed was invalid, still the judgment, levy, sale and confirmation had during the lifetime of McElroy would still be in full force, and would be an amply sufficient right to base this action upon to redeem.

The statute which declares a judgment "dormant" after a certain number of years, is a statute of repose — is a statute of limitations, and must receive the same construction as any other statute of limitations. No one statute of limitations is of any higher order than another. In this action the United States Supreme Court, vol. 130, page 263, has decided that the statutes of limitation do not apply to the United States. Hence, judgment could not become dormant.

V.

THE MERITS OF THE CASE.

If courts take judicial notice of the history and geography of the country, they will know that at the time of the making of the McElroy bond Fort Scott was a frontier town, far from railroads, and situated on the turbulent border.

If courts take judicial notice of "psychological laws" (Wharton, 336) and of the "habits of men and animals," then it can assume as a presumption of fact that when, out on the fringe of civilization, a criminal is by the government arrested, that the criminal, if he gets any one to go his bail, must, in the parlance of the time and place, "put up."

The presumption in this case that the two criminals put up $2,500 to cover possible fine and costs is strengthened by an inspection of the record, where it is shown that two days after signing the bond,

Mr. McElroy buys the piece of land now in litigation, and pays $2,500 down. On August 3d, he signed the bond. On August 5th, he bought the land and paid the money.

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